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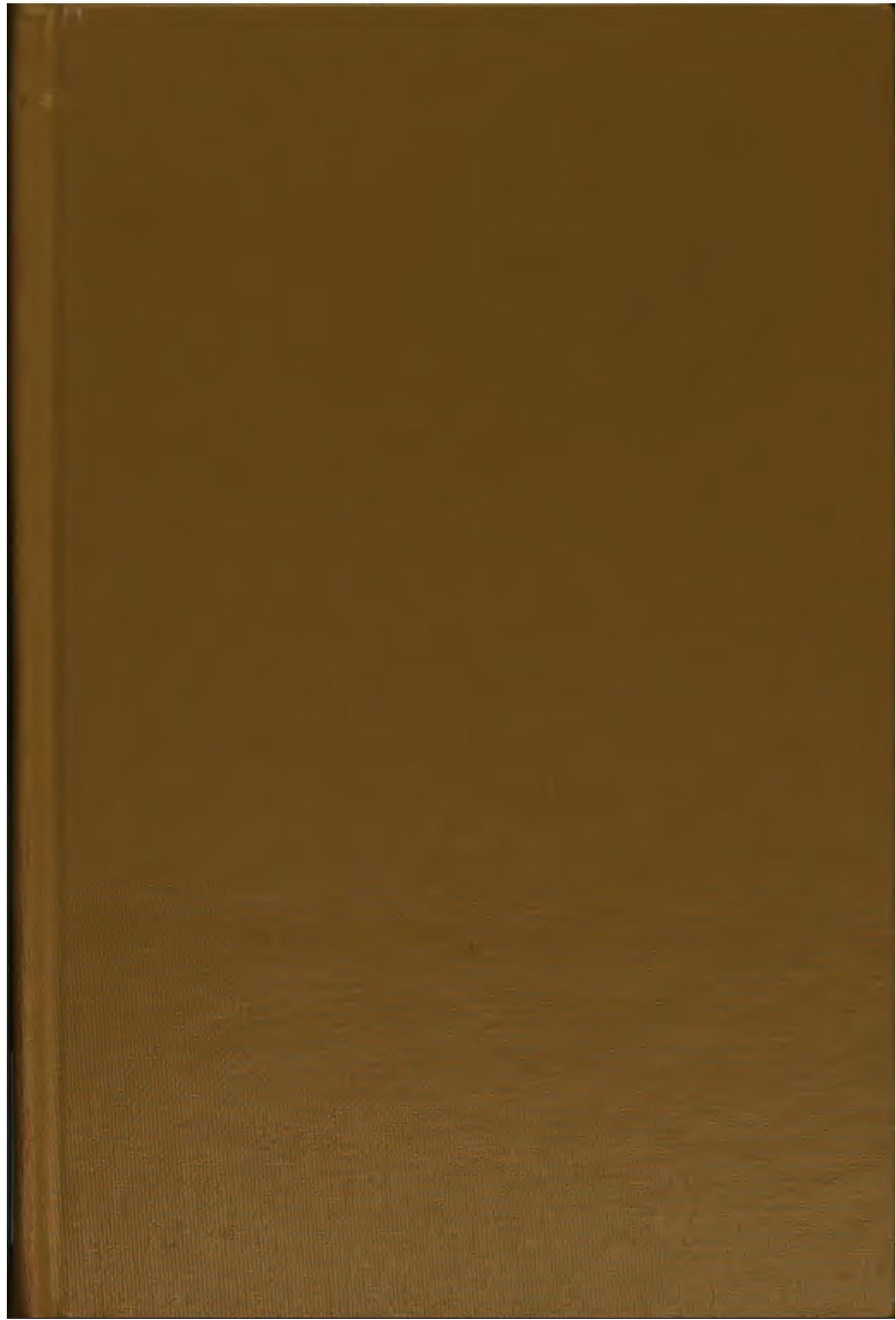
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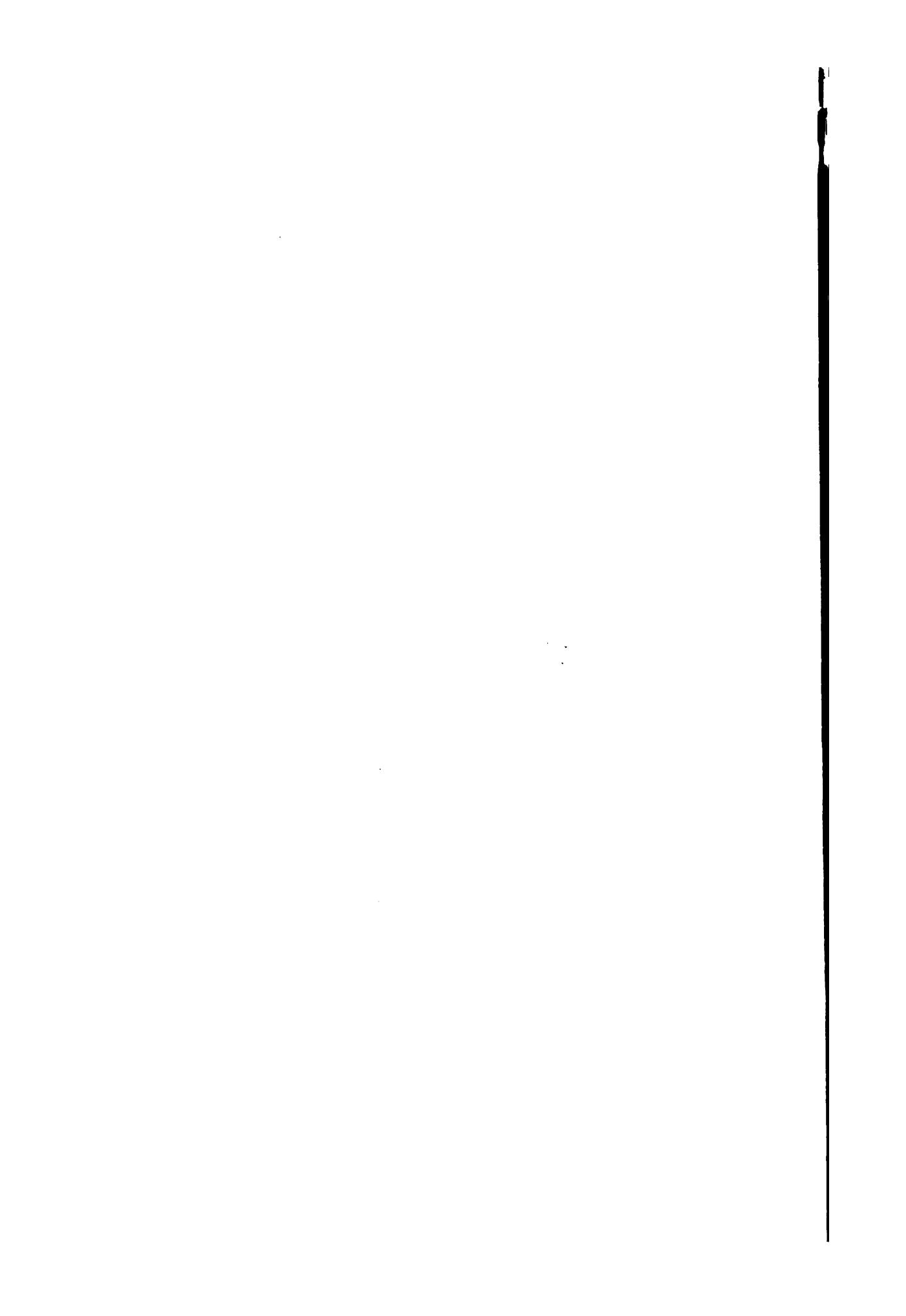
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SPRAGUE'S

ILLUSTRATIVE CASES ON THE LAW OF DOMESTIC RELATIONS.



Felix Baiget

THE SPRAGUE CORRESPONDENCE SCHOOL OF LAW,
DETROIT, MICH.

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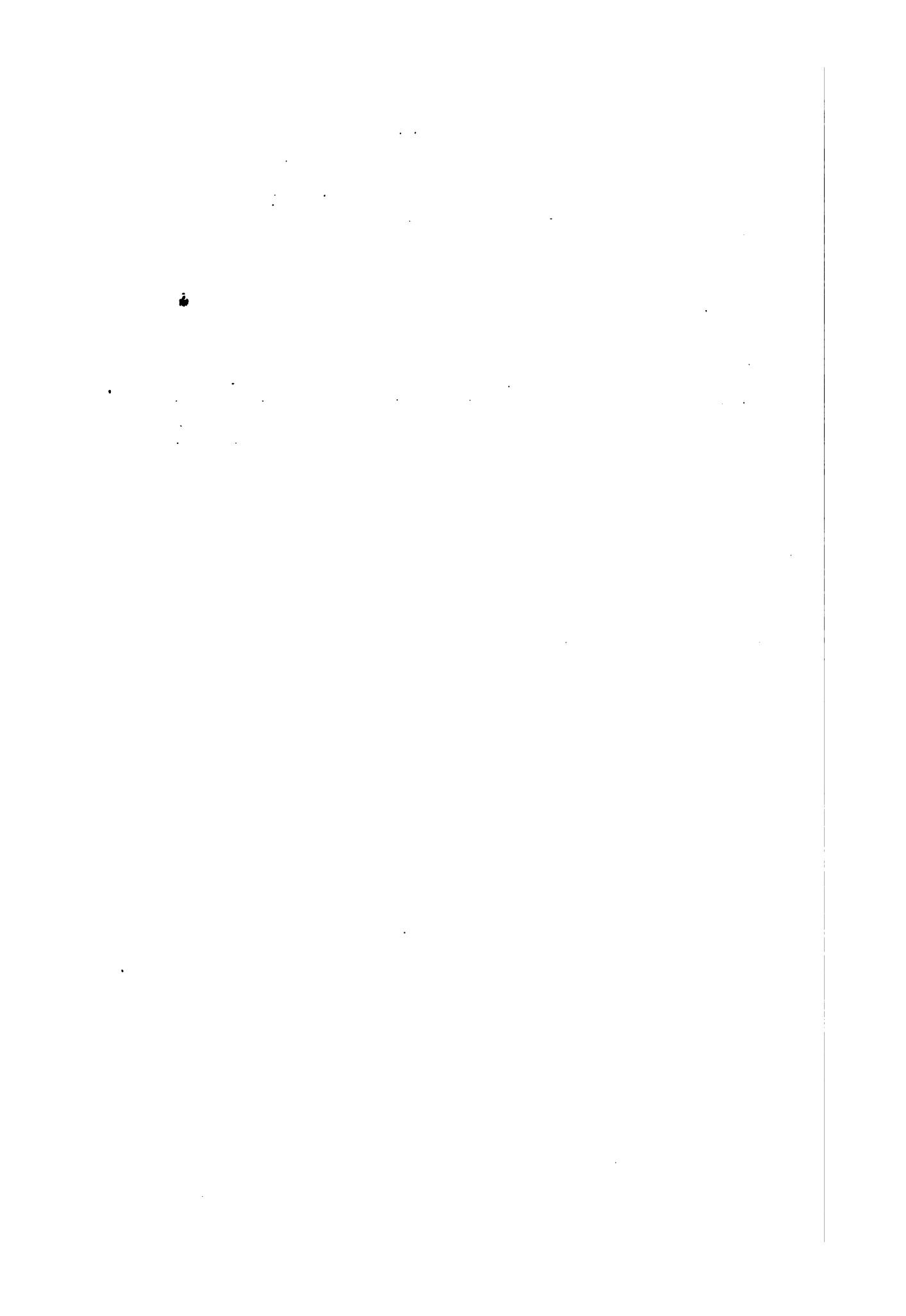
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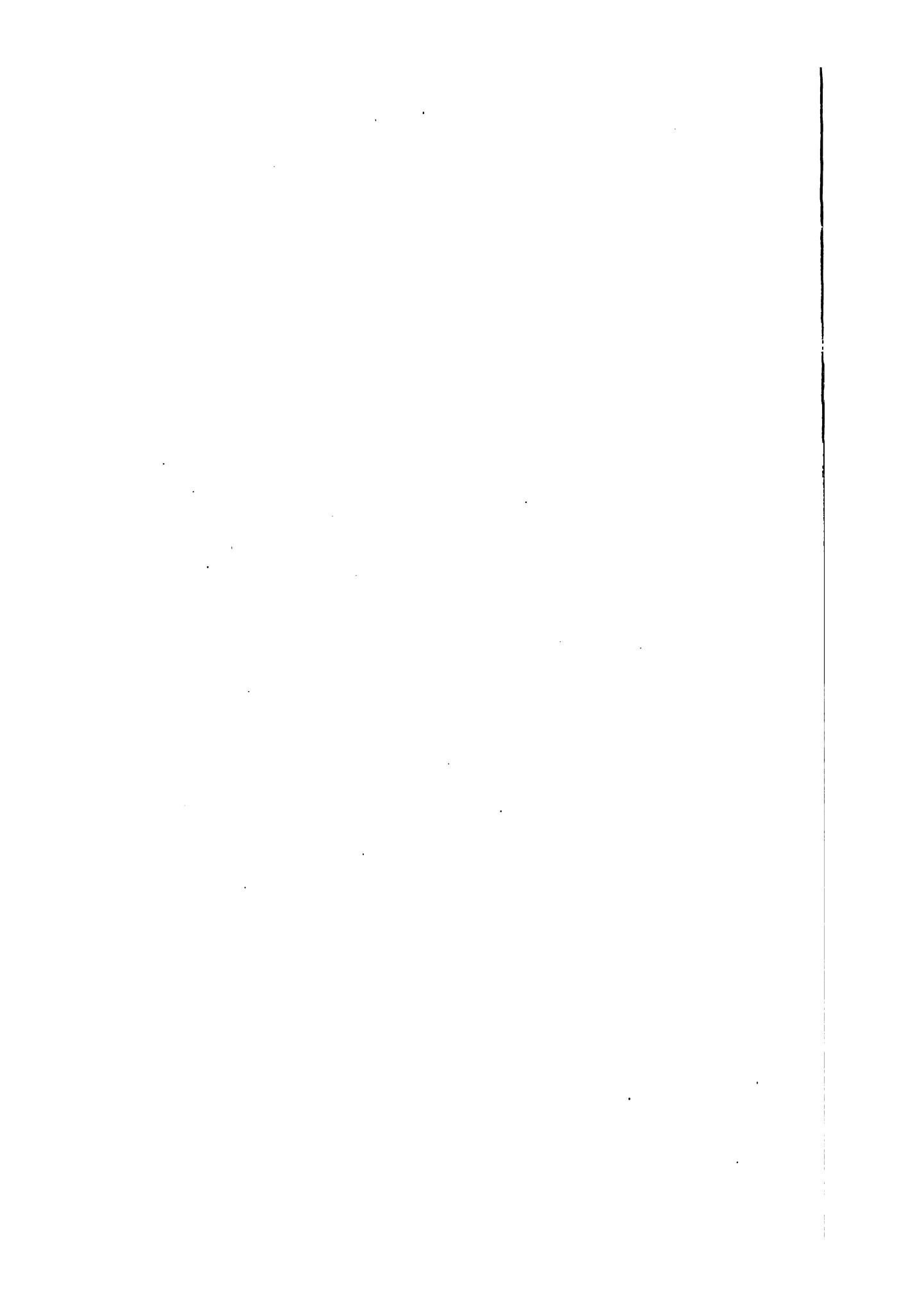
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ILLUSTRATIVE CASES
ON THE
LAW OF DOMESTIC RELATIONS

ILLUS.CAS.DOM.R.

(1)*



In re HOBBS et al.

(Fed. Cas. No. 6,550, 1 Woods, 537.)

Circuit Court, N. D. Georgia. Aug., 1871.

The relators were tried before the thirty-fifth senatorial district court of this state in the city of Atlanta, for the offense of fornication. It appears by the record, that the ordinary of Fulton county, Georgia, on August 31, 1870, issued a license directed to any minister of the gospel, judge of superior court or justice of the peace, to join in the state of matrimony the relators, "provided there is no lawful cause to obstruct the same, according to the constitution and laws of this state." The following is a copy of the certificate, which is also before me: "I certify that William B. Hobbs and Martha A. Johnson were joined together in the holy bands of matrimony on the 1st day of September, 1870, by me. Owen George." The parties were severally put upon trial before the state court and pleaded not guilty; and after argument of counsel and charge of the court the jury returned a verdict of guilty against each. Whereupon the court sentenced William B. Hobbs to pay one thousand dollars and costs, or in default to be put to work on the city or town streets or public roads of the county for six months from date of the sentence. A similar sentence was passed upon Martha A. Hobbs (alias Johnson), that she pay a fine of two hundred dollars or be put to work, etc., for the term of three months. At the time the writ of habeas corpus was applied for, the relators were in the custody of the jailer of Fulton county. The petition, among other things, stated that the relators were restrained of their liberty in violation of the constitution and laws of the United States. The writ was granted and served by the United States marshal on the jailer, who brought the parties before the United States district judge, and made the proper return upon the writ, and the question of the discharge of relators was heard on the 22d day of August, 1871.

Thrasher & Thrasher and Oglesby, for relator.

W. G. Irwin, contra.

ERSKINE, District Judge. Counsel for the relators rely upon the fourteenth amendment to the constitution, and the act of congress passed April 9, 1866, commonly known as the civil rights bill. 14 Stat. 27. The first section of the fourteenth amendment declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws." The fifth section provides that congress shall have power to enforce the amendment by appropriate legislation.

The civil rights bill was, as may be seen, passed a short time before the fourteenth amendment received the sanction of the people of the United States. In May, 1870, congress passed an act to carry into effect the fourteenth and fifteenth amendments, and by section 18 re-enacted the civil rights bill. 16 Stat. 140. The first section of this famous bill of rights is as follows: "That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every state and territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary, notwithstanding."

The primary, but not the only question presented by the relators for consideration is, whether section 1707 of the Code (Irwin's) of Georgia is repugnant to the fourteenth amendment and the civil rights bill, or to either of them—whether it invades or abridges any of the privileges or immunities—fundamental rights—secured to every citizen, by the constitution or the act of congress? The section referred to is in these words: "The marriage relation between white persons and persons of African descent is forever prohibited, and such marriages shall be null and void." This enactment was on the statute book when the state constitution of 1868 was framed. It was said, however, that it was the purpose of the convention to abrogate it by inserting section 11 of article 1. This is the section: "The social status of the citizen shall never be the subject of legislation." But the supreme court of the state, in June, 1869, in Scott v. State, 39 Ga. 321, unanimously held that section 1707 of the Code was not in conflict with this provision in the state constitution. McCay, J. (concurring in the judgment of Brown, C. J., and Warner, J.), said: "These and such laws have no bearing on the social status of the citizen. They still leave persons to choose their associates, though they provide that they shall not enter into a particular civil contract." This being the law of Georgia—this being the interpretation by the supreme court of the state of a clause in the state constitution—which clause

or provision has not been challenged here as being obnoxious to the constitution of the United States—it becomes my duty to ascertain and decide whether section 1707 is an infraction of the fourteenth amendment or the laws of congress made for its enforcement.

[It may not be unworthy of observation that, since the decision of the state supreme court, in *Scott v. State*, there have been two sessions of the general assembly—composed of colored members as well as white—yet no effort whatever was made at either session to repeal or modify section 1707. And in October, 1870, a law was enacted to "Establish a System of Education" [Laws Ga. p. 57]. By section 32, it was provided that the white and colored youth should be taught in separate schools. On the final passage of the bill all the colored and nearly every white member voted in the affirmative.]¹ Though marriage is not unfrequently viewed in our own country, as well as by foreign jurists, as a contract in the common meaning of the term—and, indeed, it cannot be logically denied that it has, in a limited sense, properties which assimilate it to an ordinary contract, being a consentient covenant—yet it is something more; it is an institution of public concernment, created and governed by the public will of the state or nation. It is a relation which can be annulled only through the intervention of judicial tribunals, unless such power has been also given to the legislature. [Mr. Bishop, in his accurate and learned work on Marriage and Divorce, says (volume 1, § 8): "While the contract is merely an executory agreement to marry, it differs not essentially from other executory contracts; it does not superinduce the status. * * * But when the contract is executed in what the law regards a valid marriage, its nature as a contract is merged in the higher nature of the status."]¹ Nor, I apprehend, is marriage considered to be embraced within that clause of section 10 of article 1 of the national constitution, which prohibits the states from passing any law impairing the obligation of contracts; and Chief Justice Marshall, in *Dartmouth College v. Woodward*, 4 Wheat. [17 U. S.] 518, observes "That the provision in the constitution has never been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It has never been understood to restrict the general rights of the legislature to legislate on the subject of divorces." In another part of the opinion, the same great magistrate said: "The framers of the constitution did not intend to restrain the states in the regulation of civil institutions, adopted for internal government." Id. 629. And Mr. Justice Daniel, in *Butler v. Pennsylvania*, 10 How. [51 U. S.] 416, said that "the contracts designed to be protected by the constitution are those by

which perfect rights, certain definite, fixed private rights of property are vested." So, on principle and authority, it is plain that the institution of marriage is not technically a contract, nor can it be said to relate to property. The brief remarks on the subject of the marriage relation or status, and that it is not within the protection of section 10, art. 1, of the original constitution, have been made for the purpose of showing that, as words, as a general rule, are to be taken in their natural and ordinary sense, it is to be presumed that the word "contracts," as employed in the civil rights bill, possesses an equivalent, and not a narrower or broader meaning than the same word as used in the provision of the constitution just referred to. By looking to the act itself, this view will become conspicuously manifest. It provides that the colored citizen shall have the right to make and enforce contracts, sue, be parties, give evidence, inherit, purchase and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by the white citizens—equal privileges and immunities with the white citizen.

In the case of *Live Stock, etc., Association v. Crescent City, etc., Co.* [Fed. Cas. No. 8,408],² which was decided in New Orleans, a few days after the passage of the law reenacting the civil rights bill, but before the reenactment obtained publicity, Mr. Circuit Justice Bradley (Woods, Circuit Judge, concurring) remarked that the civil rights bill was in pari materia with the fourteenth amendment, and was probably intended to reach the same object. And he further said, that the court was disposed to hold "that the first section of the bill covered the same ground as the fourteenth amendment—at least so far as the matters in this case are concerned." And, so far as the questions in the case before me are involved, the language of Mr. Justice Bradley comes with direct pertinency. A careful perusal of the amendment and the bill makes it obvious that the design and object of both was, not only to guaranty, in the largest sense, to every citizen in the United States, the sacred right of equality before the law throughout the whole land; but also, to protect from invasion and abridgement all the privileges and immunities—essential rights—that belong to the citizen and which flow from the constitution. And I will here remark, that there still lie dormant in the national legislature, under the original constitution and the amendments thereto, vast and various powers which but await such exigencies as are necessary to call them into action. Any attempt on my part to enumerate or describe the fundamental rights of the citizen comprehended in the words "privileges and immunities," secured by the fourteenth amendment to all the citizens of the United

¹ [From 4 Am. Law T. Rep. U. S. Ct. 190.]

² 1 Abb. U. S. 388.

States, would give but an unsatisfactory result. The same words are found in clause 1, § 2, art. 4, of the original constitution. But that clause applies only to citizens removing from one state to another. And the supreme court of the United States, in *Conner v. Elliott*, 18 How. [59 U. S.] 593, declined to describe or define the word "privileges," saying, "It is safer and more in accordance with the duty of a judicial tribunal to leave its meaning to be determined in each case, upon a view of the particular rights asserted and denied therein."

In *Gibbons v. Ogden*, 9 Wheat. [22 U. S.] 188, Chief Justice Marshall said: "The framers of the constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have understood what they meant." And Judge Cooley, in his work on Constitutional Limitations (page 59), uses the following clear and attractive language: "Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government." And now it may be asked, does section 1707 of the Code, conflict with the fourteenth amendment, by abridging any of the privileges or immunities secured therein to the citizens—to the relators, white and colored, or deny to them the equal protection of the laws? Or does it conflict with the civil rights bill? The state law prohibits marriage between a white person and a person of African descent, and declares such marriage null and void. If this prohibition is transgressed, neither pains nor penalties follow to either party. But if the parties cohabit, the law of the state deems them guilty of fornication, and punishes them by fine, imprisonment and labor on the public highway, or any one or more of these penalties in the discretion of the court. Code, §§ 1707, 4245, 4487. In *Barber v. Barber*, 21 How. [62 U. S.] 582, Mr. Justice Wayne, speaking for the court, disclaimed any juris-

diction in the courts of the United States upon the subject of divorces. And Mr. Bishop says: "All our marriage and divorce laws * * * are state laws and state statutes; the national courts with us, not having cognizance of the matter within our localities." 1 Bish. Mar. & Div. § 87. [Congress, however, has enacted laws regulating marriage and divorce in the District of Columbia; and has likewise prohibited polygamy in any "territory or other place over which the United States has exclusive jurisdiction." Act 1860, c. 158 (12 Stat. 59); Act 1862, c. 126 (12 Stat. 501).]*

I have given the matters involved in this suit careful consideration, and I am of opinion that neither congress, in framing the fourteenth amendment, nor the people, when they ratified it, contemplated that questions of this nature were comprehended within the terms "privileges and immunities" as employed in that instrument. The marriage relation, which is a civil institution, has hitherto been regulated and controlled by each state within its own territorial limits, and I cannot think it was intended to be restrained by the amendment, so long as the state marriage regulations do not deny to the citizen the equal protection of the laws. Nor do I think that the state law operates unequally; the marriage relation between whites and colored cannot exist under the statutes of this state—it is null and void as to both. And the punishment or penalty adjudged to the colored citizen found guilty of fornication is like that—and none other—which is inflicted on the white citizen, the co-offender. In my judgment, neither section 1707, which inhibits marriage between a white person and a person of African descent, nor sections 4245 and 4487 which provide for the punishment of colored and white persons who are found guilty of the crime of fornication, fall within the influence of the provisions contained in the fourteenth amendment or the civil rights bill.

It is therefore ordered that the relators be remanded to the custody of the jailer.

* [From 4 Am. Law T. Rep. U. S. Cts. 190.]

HUSBAND AND WIFE.

TOWN OF MOUNTHOLLY v. TOWN OF
ANDOVER.

(11 Vt. 226.)

Supreme Court of Vermont. Rutland. Jan.
1839.

This was an appeal from an order of removal, by two justices of the peace, of Abigail Warner and her two children, from the town of Mountholly to the town of Andover. The defendants pleaded that the paupers were unduly removed, which issue was joined to the jury. It was admitted that Pierce Warner had had his last legal settlement in the town of Andover. The plaintiffs offered in evidence the record of a certificate of marriage of the said Abigail with the said Pierce, on the 5th day of June, 1834, by a justice of the peace of Rutland county, which was read, without objection. It was admitted that the children were born since the date of such marriage. The defendant town, for the purpose of invalidating such marriage, offered evidence tending to show that such ceremony of marriage was had and celebrated before such justice without the consent of the parties thereto. This testimony was objected to by the plaintiffs, but admitted by the court. The jury were instructed by the court that such marriage would be void in law, if the ceremony was had before the justice without the consent of the parties thereto, but by the constraint and coercion of others. It was admitted that the parties had not cohabited since their marriage. Verdict for defendants, and judgment.

Merrill & Ormsbee, for plaintiffs. S. Foot, for defendants.

— REDFIELD, J. In this case the question of the legality of the marriage of the pauper arises upon the trial of the question of her legal settlement. The case found by the jury is, that the ceremony of marriage was had before the justice, without the consent of the parties. It was a marriage by force and duress. Is such a marriage sufficient to change the settlement of the female?

Such a marriage has always been held void. Marriage is a contract, and requires the *consensus animorum* as much as any other contract. It was considered exclusively a civil contract, throughout all Christendom, until the time of Pope Innocent III. In the tide of usurpation of temporal power by the Bishop of Rome, that of celebrating marriages would not be considered unimportant. That pope accordingly declared it to be exclusively a religious sacrament. In most catholic countries marriage has since that period been regarded as a sacrament, and, as such, to belong to the spiritual courts. In England, too, all matrimonial cases belong exclusively to the ecclesiastical jurisdiction.

With us marriage is but a civil contract, required to be celebrated in some public manner before a civil magistrate or minister of "the gospel. When the relation is once created, it becomes of perpetual obligation unless dissolved by competent authority.

It is admitted, on all hands, that the mere fact of marriage, without the consent of parties, is of no validity. It is merely and absolutely void. It is the same as the marriage of an idiot or lunatic. 1 Russell on Crimes, 206. 1 Black. Com. 438, 439. 2 Stark. Ev. 937.

In all cases where the marriage is void, and comes in controversy collaterally, between those not parties to the contract, as in the present case, it may be impeached. Middleborough v. Rochester, 12 Mass. Rep. 363.

But, perhaps, even a void marriage, where the parties to the contract are concerned, would not be allowed to be attacked in this collateral manner. The case of Wightman v. Wightman, 4 Johns. Ch. 343, is certainly a highly respectable authority to that effect. Some of the earlier authorities consider the marriage of a lunatic or idiot, even, as binding until dissolved by a decree to that effect.—Manby v. Scott, 1 Lev. Rep. 4, 5. 1 Sid. Rep. 109. Bac. Abr. Baron and Feme, H. 1 Roll. Abr. 357. Judge Reeve and Chancellor Kent seem to consider this the settled rule upon the subject.

I should very much hesitate to differ from so respectable authority, but must say I can see no good foundation for the rule. If the ceremony is a mere form, had without the consent of the parties, it no more constitutes a marriage than if it were had without the knowledge of the parties. And it would be monstrous to suppose, that if a justice of the peace should presume to record the marriage of two parties competent to contract, but without consulting the parties, it would be necessary for them to resort to a decree of divorce, in order to avoid the effect of the record. It is difficult to perceive why a marriage, had without the consent of the parties, should be of any more validity than if one of the parties had, at the time, a former husband or wife living. In the latter case, no decree of divorce is ever required. Indeed, the court *would not pass a decree in such case. We always require evidence of a marriage before we proceed to decree a divorce. The very word divorce, *ex vi termini*, imports a marriage.

At all events, it could not be required that the town of Andover, in order to avoid the effect of the marriage, should institute any proceeding to annul what is, in itself, void. In short, no such proceeding could be instituted by them. A decree of divorce could only be obtained at the suit of the parties to the marriage.

Judgment affirmed.

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BOYLAN et al. v. DEINZER et al.

(18 Atl. 119, 45 N. J. Eq. 485.)

Court of Chancery of New Jersey. July 25,
1889.On final hearing on bill, answer, and
proofs.Bill in equity by George W. Boylan and
Thomas F. Boylan, infants, by their next
friend, against George Deinzer and Ann Boy-
lan, to compel an accounting by Deinzer for
the rents and profits of certain lands held by
him as lessee of Ann Boylan.*Alan H. Strong*, for complainants. *Charles
H. Runyon and George C. Ludlow*, for de-
fendant Deinzer.

VAN FLEET, V. C. The principal ques-
tion presented for decision in this case is
whether the complainants are entitled to re-
cover, as against the defendant George Dein-
zer, the rental value of a house and lot situ-
ated in the city of New Brunswick, from May
1, 1883, to August 1, 1885. The complain-
ants are infants, and they rest their right to
recover in equity on that fact, and also on
the further fact that Deinzer intruded on
their lands, and took the profits of them for
the period above named. They claim that
by force of these facts they have a right to
regard him as their guardian or trustee, and
to compel him to account in equity for what-
ever he has received from their lands. The
lands from which the rents in question were
derived were, on the 24th day of April, 1880,
conveyed by William Boylan, the father of
the complainants, to John Helm. Helm, on
the same day, conveyed them to Ann Boy-
lan. Ann was then the wife of William
Boylan, and she is the mother of the com-
plainant Thomas, and the step-mother of the
complainant George. The deed from Helm
to Ann is without words of inheritance in
the granting clause. Its *habendum*, how-
ever, reads as follows: "to have and to hold,
all and singular, the above-described land
and premises, with the appurtenances, unto
the said party of the second part, for and dur-
ing the term of her natural life, or so long as
she remains the widow of the said William
Boylan, and if she shall marry again, then, at
such time as she shall marry after the decease
of the said William Boylan, the property here-
inbefore described to descend to and become
the property of Thomas F. Boylan and George
W. Boylan, their heirs and assigns, forever;
and, in case of her decease without having
married, the said property to descend to and
become the property of the said Thomas F.
Boylan and George W. Boylan, their heirs
and assigns, forever." William Boylan died
on the 1st day of September, 1881. His wid-
ow, Ann, at the time of his death, was in
possession of the house and lot conveyed to
her by Helm, and continued in possession of
them up to the 1st of May, 1883. She con-
tracted a second marriage in December, 1882,
by marrying her step-grandson, the grand-

son of William Boylan, her first husband.
Just prior to the 1st of May, 1883, Ann let
the house and lot, by written lease, to the de-
fendant Deinzer for a term of two years,
commencing on the 1st of May, 1883, at a
rent of \$120 a year, and she subsequently
granted a further term of one year to Dein-
zer for a like yearly rent. Deinzer occupied
the demised premises up to August 1, 1885,
when he surrendered them to the complain-
ants on demand being made on behalf of com-
plainants for their possession. The prem-
ises the day previous—July 31, 1885, had
been conveyed to the complainants by John
Helm. This deed passed, by express words,
all rents and profits which Helm had been or
could be entitled to since the remarriage of
Ann Boylan. Deinzer had paid the whole of
the rent reserved by both leases to Ann Boy-
lan prior to his surrender, and before he
knew that the complainants had any right to
or interest in the demised premises. The
proofs show that while Deinzer occupied the
premises he was ignorant of the complain-
ants' right to them. His conduct in paying
the whole of the rent to Mrs. Boylan long in
advance of the time when, by the terms of
the leases, it would have fallen due, furnishes
evidence quite conclusive in its character
that he had no doubt or suspicion respecting
the validity of her title. In renting the
premises he seems to have been actuated by
benevolent rather than fraudulent or avari-
cious motives. His object seems to have
been to assist a poor and needy widow to get
means to support herself and her child. At
the time the leases were made to Deinzer
Mrs. Boylan was not living with her second
husband. They separated soon after mar-
riage. They were married by a priest of the
Roman Catholic Church. As soon as he
learned that the wife was the step-grand-
mother of her husband, and that the husband
was the step-grandson of his wife, he went
to them and told them their marriage was
void by the law of the church, and that they
must separate, and they did so at once, and
have not since cohabited or lived together.
The rents paid by Deinzer to Mrs. Boylan
were, with the exception of an inconsid-
erable part, applied by her to the support of her-
self and the complainant Thomas. The other
part was expended by her for the benefit
of the complainant George. On these facts
the complainants ask a decree compelling the
defendants to account for and pay over the
rents of the premises in question from May
1, 1883, to August 1, 1885. No account
prior to May 1, 1883, is asked, although Mrs.
Boylan remarried more than a year prior to
that date. This suit is aimed mainly, if not
exclusively, at Deinzer. Mrs. Boylan is
without means, and probably always will be.
Deinzer alone has answered, and the only
question in dispute is whether the complain-
ants are entitled, as against him, to the re-
lief they ask.

The first defense which the defendant
Deinzer makes to the complainants' case is

that the marriage of Ann Boylan with her step-grandson was absolutely void. If this is so, she has not, as a matter of law, remarried since the death of her first husband, but is still his widow and a single woman, and she still continues to hold, perfect and complete, the estate granted to her by John Helm. The statute concerning marriages declares that no man and woman shall intermarry who are related to each other within the degrees thereafter specified, and then, in specifying the degrees the statute says that no man shall marry his grandfather's wife, and that no woman shall marry her husband's daughter's son, or her husband's son's son. Revision, p. 631, § 1. But this statute goes no further. It does not declare that if a man and woman who are related within the prohibited degrees marry, their marriage shall be void. On the contrary, the statute concerning divorces declares that a divorce from the bond of matrimony may be decreed in case the parties are related within the degrees prohibited by law, but that the sentence or decree in such a case shall not render the issue of such marriage illegitimate, (Id. p. 315, § 3;) but, where either of the parties to a marriage shall have a former husband or wife living at the time of their marriage, their marriage shall be invalid from the beginning, and absolutely void, and the issue thereof shall be deemed to be illegitimate, (Id. § 2.) When these three provisions are considered together, it is made entirely plain, as I think, that the law-making power meant that a marriage between persons within the prohibited degrees should not be void, but merely voidable, and that until such a marriage was dissolved by a court of competent jurisdiction, in a direct proceeding instituted for that purpose, it should, in all collateral proceedings, be considered and adjudged to be valid. This is the well-established doctrine of the common law. 1 Bish. Mar. & Div. §§ 105, 110, 112. From this view it necessarily follows that the marriage contracted by Ann Boylan in December, 1882, put an end to her estate in the lands in question, and for present purposes I shall assume that, immediately on the termination of her estate, the complainants became entitled in equity to the lands from which the rents in question were derived.

The principle of equity jurisprudence, upon which the right of the complainants to relief against Deinzer is placed, is stated by Judge Story in that part of his *Commentaries on Equity Jurisprudence* in which he defines in what instances, and under what circumstances, a court of equity may properly entertain an action for mesne profits, as follows: "Thus, for instance, if a man intrudes upon an infant's lands and takes the profits, he is compellable to account for them, and will be treated as a guardian or trustee for the infant. And this is but following out the rule of law in the like case, for so greatly does the law favor infants that if a stranger enters into and occupies an infant's lands he is com-

pellable at law to render an account of the rents and profits, and will be chargeable as guardian or bailiff." 1 Story, Eq. Jur. § 511. The same distinguished author, in a subsequent part of his *commentaries*, says: "The court of chancery will exercise a vigilant care over guardians in their management of the property of infants * * * so far as to reach other persons than those who are guardians strictly appointed; for if a man intrudes upon the estate of an infant, and take the profits thereof, he will be treated as a guardian, and held responsible therefor to the infant in a suit in equity." 2 Story, Eq. Jur. § 1356. The rule of law alluded to by Judge Story is of great antiquity. Littleton states it in these words: "And if any other man, who is not the next friend, occupies the lands or tenements of the heir as guardian in socage, he shall be compelled to yield an account to the heir as well as if he had been next friend; for it is no plea for him in the writ of account to say that he is not the next friend, etc., but he shall answer whether he hath occupied the lands or tenements as guardian in socage or no. But, query, if after the heir hath accomplished the age of fourteen years, and the guardian in socage continually occupieth the land until the heir comes to full age of twenty-one years, if the heir at his full age shall have an action of account against the guardian from the time that he occupied after the said fourteen years, as guardian in socage, or against him as his bailiff." 1 Co. Litt. § 124, p. 89.

Now, although the court of chancery of England has repeatedly enforced the principle on which the complainants rely for relief, I have found no instance in which so harsh and unjust an application of it has been made as must be made in this case if relief is awarded against Deinzer. The original design of the principle is apparent. It was intended to put it in the power of an infant to obtain redress against any person who should intrude upon his lands,—that is, take wrongful possession of them, with intent to take the profits of the land for his own use, and deprive the infant of them. An intrusion is defined by Blackstone to be an entry by a stranger on lands after a particular estate of freehold in them is determined, and before entry by the remainder-man or reversioner, (3 Bl. Comm. 169;) but it was not intended by this principle, as I conceive, to raise a liability in favor of an infant owner against a person who should innocently enter on an infant's land, under an intruder, as his tenant, and who has paid rent to the intruder in good faith. Neither the spirit of the rule nor its words give it so wide a scope. It is aimed solely at the intruder, and makes him liable. It is directed against the person who intrudes on the land and takes the profit, but it imposes no liability on those who innocently enter under the intruder, and who, without notice that his possession is wrongful, pay rent to him. And this I understand to be the construction which the rule has re-

ceived in the adjudged cases. Among the earliest cases decided according to this principle is *Allen v. Sayer*, 2 Vern. 368. The report cited is Raithby's edition of Vernon, published in London, in 1828. In this case the lands in question were devised to trustees until the testator's debts were paid, and then they were given to the plaintiff and his heirs. At the time the devise to the plaintiff took effect he was an infant. During his infancy Peter Sayer, the father of some of the defendants, entered on the lands and levied a fine, and non-claim passed. Sayer subsequently conveyed the lands to some of the defendants, and then died. When the plaintiff attained his majority, he brought ejectment for the lands, but was nonsuited in consequence of the fine and non-claim. He then filed a bill in equity to recover the lands, and also for an account of the profits. Lord SOMERS, in deciding the case, held that, although the fine and non-claim constituted a good bar at law, they did not bar a recovery in equity, and he accordingly decreed possession to the plaintiff, and also that he was entitled to an account of the profits so far as the defendants had assets of Peter Sayer, but no further. The plaintiff's remedy, it will be observed, was limited strictly to the liability growing out of the intrusion committed by the defendants' ancestor, and, although they attempted to defend a title which had no foundation but a trespass, yet they were not held personally answerable for the wrong they did in occupying the plaintiff's land, but the wrong in respect to which the plaintiff was given redress was regarded as the wrong of the defendants' ancestor, and the defendants were simply held liable to the extent that they had derived assets from their ancestor. In all the subsequent cases involving the enforcement of this principle which I have examined, and in which the defendant has been held liable, his liability has been put distinctly on the ground that he either knew, or should have known, from papers in his possession that he was in the possession of lands belonging to an infant, and for which he should pay rent to the infant. Thus, in *Bennet v. Whitehead*, 2 P. Wms. 644, Lord KING said the defendant must account, as it appeared that he had the deed and counterpart of the lease in his possession which made out the plaintiff's title. And in *Dormer v. Fortescue*, 3 Atk. 124-130, Lord HARDWICKE said that the general rule of the court was to decree an account of rents and profits from the time the plaintiff's title accrued "unless upon special circumstances, and then they will restrain it to the time of bringing the bill; as where the defendant had no notice of the plaintiff's title, nor had the deeds and writings in his custody in which the plaintiff's title appeared, or where the title of the

plaintiff appeared by deeds in a stranger's custody." To the same effect are the remarks of Lord LANGDALE, master of the rolls, in *Blomfield v. Eyre*, 8 Beav. 250-258. He said: "The authorities relating to cases of this kind, in which the court will exercise jurisdiction, are not very distinct, perhaps not altogether consistent; but it is to be observed that in this case the defendant, aware of the facts, took and held possession during the infancy of the plaintiff, dealt with the property, or at least so much thereof as purported to be conveyed to him, as his own, took possession of the documents of title relating to the whole, and delivered them over to his own mortgagee." The liability of the defendant in *Nanney v. Williams*, 22 Beav. 452, and also in *Hicks v. Sallitt*, 3 De Gex, M. & G. 781-812, was put upon the same ground.

The rule laid down by Lord HARDWICKE would seem to hold that even an intruder is not liable for mesne profits in case he enters innocently, under an honest belief that he has good right to do so, until he receives notice of the infant's title. Whether this is true interpretation of the rule or not, it is not necessary now to decide; for, viewing the rule in its most rigorous aspect, I regard it as entirely clear that this case, so far as it affects Deinzer, does not come within either its language or its spirit. Deinzer did not intrude upon the complainant's lands in the sense in which those words are used in the rule, nor did he take the profits of their lands. He entered as the tenant of the person who, for over three years, had had the continued and uninterrupted possession of them, and who stood to the complainants in *loco parentis*, under an agreement to pay, and he did pay, rent to his lessor, believing that she was entitled to the premises. Her previous possession justified his belief. Under such circumstances Mrs. Boylan must be held to have been the sole intruder. She alone derived any profit or advantage from the intrusion. If she had been of sufficient pecuniary ability to respond to the claim of the complainants, it is highly improbable that any claim would have been asserted against Deinzer. It may be that in that event no claim would have been made against anybody; but, be that as it may, my opinion is clear and decided that on the facts of this case the complainants have no right to relief against Deinzer. Their bill must, therefore, as against him, be dismissed, with costs. If it is desired, a decree directing Mrs. Boylan to account to the complainants will be made. The decree will, however, direct that all just allowances shall be made to her for such parts of the rents received by her as she has applied to the support and maintenance of the complainants.

J. G. v. H. G.

(33 Md. 401.)

Court of Appeals of Maryland. Oct. Term,
1870.

Appeal from circuit court of Baltimore city.

This is an appeal from a decree of the court below dismissing the bill of the appellant, which prayed a divorce a vinculo matrimonii from his wife, the appellee, on the ground of her impotence, which existed at the time of their marriage.

Before BARTOL, C. J., and BRENT, GRASON, and MILLER, JJ.

Geo. Wm. Brown and I. Nevett Steele, for appellant. S. Teackle Wallis, for appellee.

BARTOL, C. J. The bill of complaint in this case was filed by the appellant, praying for a divorce a vinculo, on the ground of the alleged impotence of the appellee.

It appears from the pleadings and proofs that the parties to this suit were married in Baltimore on the 31st day of March, 1864; the appellant then being 49 years of age and the appellee 28. They started on a tour of the West immediately after their marriage. Physical impediments to the consummation of the marriage having been discovered, the appellee submitted to an examination of her person by Dr. Thomas Wood and Dr. S. O. Almy, eminent physicians and surgeons of Cincinnati, whose testimony is contained in the record. After the return of the parties to Baltimore, on the 25th of May, 1864, another surgical examination was made by Dr. Inloes, the family physician of the appellee, aided by Prof. Nathan R. Smith. The testimony of these physicians is also in the record. On the 29th of June in the same year, a deed of separation was entered into, whereby the sum of \$10,000 was conveyed and secured by the appellant to certain trustees therein named, for the separate use of the appellee for her support, she agreeing to relinquish all further claim or interest in his estate, and the parties mutually agreeing to live separate from each other, as if unmarried. The separation under the deed continued for nearly three years, when on the 8th day of May, 1867, this bill was filed. One of the prayers of the original bill was that the deed of separation might be set aside; but in the progress of the cause, on the 15th day of February, 1869, a paper was filed by the complainant, signed by his solicitors, waiving all that part of his bill and the prayer therein seeking to set aside the deed of settlement, and leaving all vested rights in the trustees and in the appellee under the deed unassailed and unaffected by any decree in the cause. The only question, therefore, presented by this appeal arises upon the prayer for a divorce.

The appellee opposes the application for a divorce upon two distinct grounds: (1) The alleged impotence is denied. (2) It is contended that the deed of separation is a bar and estoppel to the right of complainant to maintain the present suit. "The impotence of either party

at the time of marriage" is one of the causes prescribed in the Code for which the court is authorized to decree a divorce a vinculo matrimonii. 1 Code, art. 16, § 25. Has the alleged impotence of the appellee been proved? A careful examination of the evidence has convinced us that this question must be answered in the affirmative. Without repeating here, at length or in detail, the evidence on this most delicate and painful question, it may be stated that the testimony of the examining surgeons establishes the following facts: That the physical condition of the appellee, at the time of marriage, was that of a very imperfect development of the sexual organs, both externally and internally. These organs were in a rudimentary condition, evincing that their development had ceased and been arrested before the age of puberty. She had never experienced the monthly sickness to which females of mature age are subject, and was without the natural passion or desire incident to woman. The rudimentary condition of her sexual organs, and their imperfect development, not only rendered conception impossible, but there was on her part an incapacity for vera copula; that is to say, she was not capable of the act of generation in its natural and ordinary meaning, but only of incipient and imperfect coition. In giving the results of their examination, the surgeons differ somewhat as to the degree or extent of the organic defects; but we have stated the conclusions which appear to us to be established by their testimony. They all concur in saying that the defect is incurable. Whatever differences of opinion may have arisen as to the legal definition of impotence, it is well settled that if, by reason of malformation or organic defect existing at the time of marriage, there cannot be a natural and perfect coition, vera copula, between the parties, and it appears that the defect is permanent and incurable, the case comes within the legal definition of impotence, and is cause for nullity of marriage. Deane v. Aveling, 1 Rob. Ecc. 279; Devenbagh v. Devenbagh, 5 Paige, 554; 1 Bish. Mar. & Div. §§ 325-340. The charge made by the appellee in her answer, that the difficulty in consummating the marriage proceeded from physical defect or incapacity on the part of appellant, has not been sustained by proof; and we are of the opinion, upon all the evidence in the cause, that the appellant is entitled to a divorce a vinculo, unless by the deed of separation he is barred and estopped from maintaining this suit. This brings us to the examination of the second ground of defense.

What is the effect of the deed of separation upon the rights of the appellant in the present suit? By the act of assembly of 1841 (chapter 262) and its supplements, now embodied in the Code (article 16, § 24 et seq.), jurisdiction of all applications for divorce has been given to the courts of equity. Under that provision this suit has been instituted. The court in such case sits, not in the exer-

cise of its general and ordinary equitable jurisdiction, but as a divorce court, and must be governed by the rules and principles established in the ecclesiastical courts in England, wherein a similar jurisdiction has been exercised, so far as they are consistent with the provisions of the Code. By the fourteenth section of article 16, the Code expressly provides that all causes for alimony "are to be heard and determined by the courts of equity in this state in as full and ample a manner as they could be heard and determined by the laws of England in the ecclesiastical courts there." In respect to the mode in which the courts of equity shall exercise jurisdiction in divorce cases, and the principles by which they are to be governed, the Code is silent; but from the nature of the jurisdiction itself it has always been considered that the decisions of the English ecclesiastical courts, in similar cases, may properly be referred to as precedents, and they have uniformly been cited and relied on as safe and authoritative guides for the courts of this state in disposing of cases of this kind. If we refer to those precedents, it appears to have been long settled that a voluntary deed of separation between husband and wife is not per se a bar to a suit in the ecclesiastical court for a restitution of marital rights or a petition for a divorce. *Durant v. Durant*, 1 Hagg. Ecc. 783; *Beeby v. Beeby*, Id. 789; *Westmeath v. Westmeath*, 2 Hagg. Ecc. Supp. 1; *Spering v. Spering*, 8 Swab. & T. 211; *Hunt v. Hunt*, 32 Law J. R. 168. In *1 Blsh. Mar. & Div.* § 634, note 3, other cases are referred to in support of the general proposition above stated.

Some cases have arisen upon application for divorce in the ecclesiastical courts in which a voluntary deed of separation between the parties has been considered, in connection with lapse of time, and other circumstances, as sufficient to show that the application was not made bona fide for the cause assigned, but for some sinister or collateral purpose, and the application for that reason has been denied. Such were the cases of *Matthews v. Matthews*, 1 Swab. & T. 161, and *Williams v. Williams*, 35 Law J. 85, decided in 1866. But, as we have said, such a voluntary deed has never been considered per se as a bar to the suit.

The cause for which the divorce in this case is claimed, as stated in the bill and established by the proof, is one which, by the ecclesiastical law as well as by our Code, would, when judicially established, render the marriage null and void ab initio. No case can be found in which an application for a sentence of nullity of marriage for such a cause has been held in the ecclesiastical court to be barred or defeated by reason of a voluntary deed of separation entered into between the parties; and in our opinion it would be alike unjust, and against reason and public policy, as it is without precedent, so to hold.

The case of *Brown v. Brown*, 5 Gill, 249, has

been cited as an authority to show that in this state a voluntary deed of separation between the parties is a bar to an application for divorce. We do not so interpret that decision. In that case the application was for a divorce a vinculo. The cause for the divorce, charged in the bill filed by the husband, was an abandonment by the wife, which was alleged to have taken place in the spring of 1836, and to have continued ever since. The bill was filed in July, 1846. It appeared that in April, 1846, only a few months before the filing of the bill, the parties entered into a voluntary deed of separation, whereby they agreed to live separate and apart from each other. Certain property was secured to the wife for her support, all her rights to her husband's estate were relinquished, and he was secured from liability for her debts. The chancellor in his opinion, which was adopted by the court of appeals, after suggesting doubts whether, upon a true construction of the acts of assembly, the case stated in the bill came within their provisions, placed his decision refusing the divorce, upon the effect of the deed, and the absence of any circumstance which had subsequently transpired to render it necessary or proper that the relation of the parties, as established by that instrument, should be changed.

Now, looking to the only ground upon which the divorce in that case was claimed, as being an alleged abandonment by the wife, it is very obvious that the deed operated as a condonation of the offense, or as an acquiescence in the separation on the part of the husband, which so far affected his equitable rights to claim a divorce on that ground as, in the absence of any fact or circumstance occurring after the execution of the deed to justify his application for a divorce, authorized the court to infer that the application was not made bona fide for the cause alleged, and the divorce might properly be refused on grounds similar to those stated in *Matthews v. Matthews* and *Hunt v. Hunt*, above cited.

In the very recent case of *Parkinson v. Parkinson* (reported in 1870) L. R. 2 Prob. & D. 25, which was a petition by the wife for a divorce upon the ground of desertion or abandonment by the husband, the parties were married in July, 1861, and the alleged desertion took place in 1865. It appeared that the parties entered into a deed of separation in April, 1866. It was alleged in the petition, and so appeared by the proof, that the husband, from the time of the alleged desertion, had been living in adultery. At the hearing the court decided that the wife had by the deed "bargained away her right to relief on the ground of desertion," but "that she was entitled to a judicial separation on the ground of adultery, if she applies for it." The effect of that decision is that such a deed operates as a condonation of the offense of abandonment, and to that extent is consistent with the decision of the court of appeals in *Brown*

v. Brown, but is no bar to a suit for divorce for adultery, although it appeared that offense was known to the wife at the time the deed was executed; and in this respect the case is an authority against the position contended for here by the appellee.

We think it is very clear, upon the authorities, that the deed of separation in this case is not *per se* a bar to the maintenance of the present suit. There is no evidence in the case to impeach the good faith or bona fides of the appellant in bringing this suit. The only circumstance relied on by the appellee for that purpose is the lapse of time after the execution of the deed before filing the bill. But this is satisfactorily explained by the proof in the record. It appears that the complainant was restrained from instituting this proceeding by conscientious scruples, supposing it to be inconsistent with his religious duty to seek a divorce for any cause; and it appears, also, that the same motive led him to enter into the deed for an amicable separation. Those conscientious scruples were afterwards removed by a decision upon the subject, rendered by the highest ecclesiastical tribunal of the church of which he and appellee are members, and to whose authority he felt himself bound to submit, declaring the marriage null. These facts disclosed in the record, while they in no other wise affect the rights of the parties in this cause, are a sufficient answer to the suggestion that the appellant has lost his remedy by laches or acquiescence, or that his application for a divorce has not been made in good faith, and for the cause assigned.

It has been argued on the part of the appellee that, although in the divorce court the deed may not operate *per se* as a bar or estoppel to the suit, yet that a court of equity would in the present case, upon a bill filed on behalf of the appellee for that purpose, issue an injunction to restrain the appellant from prosecuting a suit for divorce, as being contrary to the terms of the deed, and in violation of the covenants therein; and this proceeding being in a court of equity, it has been

argued that, for the reason stated, the divorce ought to be denied.

In support of this position we have been referred to the decision of the house of lords in Wilson v. Wilson, 1 H. L. Cas. 533, 5 H. L. Cas. 40. We have carefully examined that case, and are of opinion that it ought not to be accepted as a binding authority in support of the appellee's position here. It seems to us that the learned court, when that case was first before them, went further than was justified by antecedent decisions. There the deed of separation contained a covenant on the part of the husband not to institute any suit in the ecclesiastical court for restitution of conjugal rights. The chancellor granted an injunction restraining him from proceeding in the ecclesiastical court contrary to his covenant, and on the first appeal the decree of the chancellor was affirmed. It appears, however, when the cause went up to the house of lords on the second appeal, grave doubts were expressed whether the court had not gone too far; and while it was held that the former decision must be adhered to as the law of that case, it may be inferred from the opinions expressed by the learned judges, among whom was Lord St. Leonards, that it was not to be considered as a precedent for a court of chancery to interfere by injunction for the enforcement of voluntary deeds of separation between married persons, any further than to compel their observance, so far as rights of property may be concerned. To that extent courts of chancery will support and enforce the stipulations of such deeds, when they are made in good faith, and are equitable in their terms, but no further; and in our judgment it would be against public policy, and contrary to the uniform current of decisions, to hold that the right of the appellant to relief in this case is barred or defeated by the deed of separation.

The decree of the circuit court will be reversed, and a decree will be signed divorcing the parties *a vinculo matrimonii*. Decree reversed, and decree divorcing the parties *a vinculo matrimonii*.

THOMAS et al. v. THOMAS.

(17 Atl. 182, 124 Pa. St. 646.)

Supreme Court of Pennsylvania. March 18,
1889.

Error to court of common pleas, Lackawanna county; ALFRED HAND, Judge.

Ann Thomas having presented her petition in the orphans' court, asking for a partition of the lands of her deceased husband, William R. Thomas, her right was contested by Richard Thomas, administrator, etc., of said decedent, and others, his heirs at law, upon the ground of the invalidity of her alleged marriage. Thereupon an issue was directed to be tried in the common pleas to determine that question. The jury returned a verdict establishing the marriage. Various exceptions were taken to the rulings of the court of common pleas on the trial, and the defendants bring error. An appeal was also taken to the decree of the orphans' court subsequently rendered, directing partition of the land. For the opinion filed therein, see 17 Atl. 181.

C. R. Pitcher, for plaintiffs in error. *D. J. M. Loop, E. N. Willard*, and *Everett Warren*, for defendant in error.

STERRETT, J. After directing who shall be, respectively, plaintiff and defendants in this issue, the order of the orphans' court further provides that it shall "be tried in the following manner: The plaintiff, Ann Thomas, shall simply put in evidence the certificate of her marriage, issued by Benjamin Jay, alderman, and then the affirmative of the issue shall be upon the defendants, with the burden of proof to show that Ann Thomas was not the lawful wife of William R. Thomas, the decedent, at the time of his death; the plaintiff affirming that she was the lawful wife of William R. Thomas, and the defendants affirming that she was not his lawful wife." The considerations that moved the court to send this issue to the common pleas for trial sufficiently appear in the opinion just filed in Appeal of Thomas, 17 Atl. 181, but they have little, if anything, to do with the consideration of the questions presented by this record. Those questions relate solely to the instructions of the learned president of the common pleas as to the effect of the evidence before the jury, and the character of the proof necessary to overcome the *prima facie* case that was made for the plaintiff below by the introduction of Alderman Jay's certificate of her marriage to William R. Thomas on January 16, 1875. It is not even alleged that there was any error in the admission or rejection of evidence. To rebut the case thus made in her favor, and to maintain the issue on their part, the defendants below introduced evidence tending to prove that about 40 years before her alleged marriage to William R. Thomas plaintiff was married to David Jones, at Llanelatog, Wales; that for many years there-

after they lived together as husband and wife at Aberdare and at Falda, in same country; and that at the time of her marriage to Thomas, and even after his decease, David Jones, her first husband, was in full life. In response to this the plaintiff, in turn, introduced evidence tending to show that Jones left Wales, and had been unheard of by her for more than seven years before her marriage to Thomas, and that prior thereto, as well as thereafter, she had reason to believe and did believe that Jones was dead. As to all these allegations of fact on the part of plaintiff as well as defendants in the issue, there was more or less conflict of testimony. According to the terms of the issue, the laboring oar was on the defendants; and, in view of the evidence on which they relied, they requested the court, in their second point, to charge: "If the jury believe that David Jones was in full life after the marriage of Ann Jones to Mr. Thomas, the marriage was void, and the verdict should be for defendants."

Assuming the jury were satisfied that plaintiff was first married to Jones, and in the absence of any evidence that she was legally divorced from him, the proposition was correct, and with that qualification it should have been affirmed. Instead of that, the learned judge said: "We affirm this, unless you find from the evidence that he was absent for a period of seven years, unheard from, and under circumstances which raise the presumption of his death, as we have already charged you." He had already charged, as complained of in the first specification of error: "Now, under all the circumstances of the case, had she the right to presume, when she married William R. Thomas, that her husband was dead under the law? If she had, then her marriage was legal, and, so far as this case is concerned, she is entitled to her civil rights as the widow of William R. Thomas, and should not be deprived of them." The vice of this instruction is that it gives the presumption referred to all the force and effect of actual death; in other words, it makes the presumption of death conclusive proof of the fact, and therefore irrebuttable. But the presumption of death arising from absence, etc., stands as competent proof of death only until it is successfully rebutted by competent and satisfactory evidence. If that was successfully done in this case, and the jury were fully satisfied that at the date of plaintiff's marriage to Thomas, in January, 1875, she had a husband in full life, viz., David Jones, from whom she had never been divorced, that fact, without more, rendered the second marriage null and void. It matters not that she had reason to believe and did believe that he was then dead. If, in truth and in fact, he was then in full life, she was incapable of contracting the second marriage, and it was therefore void. *Kenley v. Kenley*, 2 Yeates, 207; *Heffner v. Heffner*, 23 Pa. St. 104. In

the first case the court said: "Though the circumstances attending this case might exempt the defendant from the pains of bigamy, yet her first husband being in full life, and their marriage not annulled by any competent jurisdiction, the marriage was *ipso facto* void and null." In the latter it was said: "A man having a wife in full life is utterly powerless to make a valid contract of marriage, and his attempt to do so is utterly nugatory." While a well-founded belief in the death of her first husband (if in fact she had one) would have relieved plaintiff from the penalty for adultery, etc., it could not validate the second marriage, if in fact her first husband was living when it was solemnized. The act of March 13, 1815, § 6, provides: "If any husband or wife, upon any false rumor, in appearance well founded, of the death of the other, (when such other has been absent for the space of two whole years,) hath married or shall marry again, he or she shall not be liable to the pains of adultery; but it shall be in the election of the party remaining unmarried, at his or her return, to insist to have his or her former marriage dissolved," etc. The presumption, especially in criminal proceedings, is always in favor of innocence. When a marriage has been

regularly solemnized, it is presumed to be valid until the contrary is shown. When that has been done by competent and satisfactory evidence, the presumption of fact, in civil cases, must give way to the actual fact thus established. For reasons above suggested, the first and second specifications of error are sustained.

In defendants' third point the court was requested to charge: "A presumption of death, if proved, may be rebutted by evidence showing that the man was in full life during or after the period of seven years." The learned judge qualified his affirmation of this, as a general proposition, by saying: "But if the presumption has arisen, as to the wife's subsequent marriage, that he was dead, she is not deprived of her civil rights thereby." This qualification was erroneous, and in its application to the case at bar was practically a refusal of the point. The two remaining specifications present, in a modified form, substantially the same questions that have already been considered. In view of what has been said, it is unnecessary to notice either of them specially. They are both sustained.

Judgment reversed, and a *venire facias de novo* awarded.

In re HULETT'S ESTATE.

CAREY et al. v. HULETT.

(69 N. W. 81.)

Supreme Court of Minnesota. Nov. 27, 1896.

Appeal from district court, St. Louis county; S. H. Moer, Judge.

In the matter of the estate of Nehemiah Hulett, Lucy A. Hulett presented a petition for an allowance of homestead to her as his widow, and a second petition, praying that the probate of his will should be set aside. From an order setting aside the homestead and an order revoking the will, John R. Carey, as administrator, and others, appeal. Judgment setting aside a homestead affirmed. Judgment setting aside the probate of the will reversed.

James Spencer, A. L. Agatin, and J. L. Washburn, for appellants. Henry S. Mahon, Pence & Carpenter, and Davis, Kellogg & Severance, for respondent.

MITCHELL, J. Nehemiah Hulett, for many years a resident of St. Louis county, and generally supposed and reputed to be a bachelor, died July 25, 1892. Proceedings were duly had in the probate court of that county, whereby a will which he had executed in May, 1862, was proved, and admitted to probate on October 10, 1892, and John R. Carey appointed administrator with the will annexed. On February 18, 1893, the respondent, under the name of Lucy A. Hulett, presented her petition to the probate court, alleging that she was the widow of Hulett, that she was married to him on January 6, 1892, and praying that the homestead of the deceased be set apart to her, and that she be allowed to select certain personal property, pursuant to the statutes in such case made and provided. On September 13, 1893, she presented another petition to the probate court reiterating her marriage to the deceased, and praying that the probate of the will be vacated and set aside and declared not to be the last will and testament of the deceased. In this petition she alleged that she and the deceased were married by mutual consent, but without any formal solemnization, and that in evidence of such marriage a certain instrument in writing was executed by both parties at the time of the contract of marriage. Both petitions alleged, and it is an admitted fact, that Hulett died without issue, and that no issue was ever born of the alleged marriage between him and the petitioner. The only ground here material, on which it was asked that the probate of the will be vacated, was that it was revoked by the marriage of Hulett to the petitioner subsequent to its execution. The administrator, the devisees and legatees under the will, and the heirs at law of the deceased all opposed the granting of the petitions; their main contention being that the petitioner had never been married to the deceased. It appeared on the hearings before the probate court that the foundation of the petitioner's claim to

be the widow of the deceased was the following instrument, alleged to have been executed by her and the deceased on January 7, but by mistake dated January 6, 1892: "Contract of marriage between N. Hulett and Mrs. L. A. Pomeroy. Believing a marriage by contract to be perfectly lawful, we do hereby agree to be husband and wife, and to hereafter live together as such. In witness whereof we have hereunto set our hands the day and year first above written. [Signed] N. Hulett. L. A. Pomeroy." The probate court decided adversely to the petitioner, and denied both her petitions, whereupon she appealed to the district court in both cases. Inasmuch as the main, if not the only, issue in both appeals was whether there had been a valid common-law marriage between the petitioner and the deceased, both were tried together. When the appeals came on for trial, the district court ordered that the following question be submitted to a jury, viz.: "Was the paper purporting to have been made on January 6, 1892 [the marriage contract above set forth], in fact executed by the late Nehemiah Hulett?" All other issues of law and fact, if any, were reserved to be tried and determined by the court. Exception is taken by the appellants to the action of the court in submitting this question to a jury. But upon the record no such objection is open to the appellants, because it appears that this is one of the very questions, but better expressed, which they themselves asked to be thus submitted. The court, however, had a right to do this on its own motion. Gen. St. 1894, § 5361. This practice is as old as courts of chancery themselves, and this is just the kind of a question which those courts were in the habit of sending out to a court of law to obtain the verdict of a jury. So far from trying the issues piecemeal, as counsel claim, this question was really decisive of the only issue of fact in the case, as we will hereafter show. The case proceeded to the trial before a jury of the question thus submitted to them. Of course, the contest was over the genuineness of Hulett's signature to the marriage contract. While evidence was introduced as to various collateral facts tending more or less directly to throw light on this question, the bulk of the evidence consisted of the testimony of experts, properly so called, and of persons acquainted with Hulett's handwriting, as to whether his purported signature to the marriage contract was genuine or a forgery. As is usual in such cases, the testimony of these witnesses was very conflicting; but the jury answered the question submitted to them in the affirmative, and it is not claimed, and could not be successfully, that the evidence did not justify the verdict. Hence, unless errors of law, duly excepted to, occurred during the trial of this issue, it must stand as a settled fact, with all its legal consequences, that Hulett and the respondent did execute the marriage contract on the 7th of January, 1892. This disposes of the first assignment of error.

2. Of the various assignments of error relating to the rulings of the court admitting or

excluding evidence on the jury trial only three—the ninth, tenth, and fourteenth—are worthy of special notice. The appellants offered in evidence a mortgage on real estate executed by Hulett alone on the 31st of May, 1892, in the certificate of acknowledgment of which the notary described Hulett as a single man. This was excluded by the court. Counsel then offered to prove by other documents that Hulett, subsequent to the date of the alleged marriage contract, "continued to make conveyances of property and execute legal instruments in which he was designated as a single and an unmarried man in the same manner as prior to said date." This offer was likewise excluded. Counsel then offered in evidence a bill of sale executed by Hulett on May 31, 1892, in the certificate of acknowledgment of which the notary described Hulett as a single man. This offer was accompanied by a statement of counsel that this bill of sale was "simply an additional document on the same line." This offer was also excluded. In view of the specific offers which thus preceded and followed the general offer, we think the latter must be construed as meaning, not that Hulett described himself as a single man in the body of the instrument, but merely that he was so described in the certificate of the officers who took his acknowledgments. But, however that may be, and without considering the competency of such evidence had it been sought to prove a contract of marriage by "habit and repute," we are clearly of opinion that it was inadmissible upon the sole issue then being tried before the jury, to wit, whether Hulett executed the express written contract of marriage referred to. Any statements he might have made in these conveyances were certainly no part of the res gestae, to wit, the execution of the written contract of marriage. As respects that subject, it seems to us that such evidence would be merely the subsequent self-serving statements of one of the parties. The fourteenth assignment is that the court erred in admitting in evidence Exhibit 138, being a letter written July 24, 1892, by the respondent to her sister, in Ohio, containing references to her relations to Hulett; as, for example, where she speaks of him as "my husband" and "your brother Hulett." If Hulett had been in no way connected with this letter, so that it would have been the mere statement of the respondent herself, it would have been inadmissible. But the testimony of the respondent was that she wrote it in the presence of Hulett, and then handed it to him to read; that he read it, put it in an envelope, sealed it, and put it in his pocket. She further testified that she subsequently received it back from her sister, to whom it was written. This letter, according to respondent's testimony, was written the day before Hulett's death. The next morning he left home, to take the cars to go to Duluth, but died suddenly at the station, while waiting for the train. After his death, a number of letters, addressed, and apparently intended to be mailed, were found in his pocket by the undertaker, who gave them to a nephew

of the deceased, who put stamps on them, and posted them. As this letter reached the person to whom it was written, the fair inferences from the evidence are that this was one of the letters found in Hulett's pocket after his death, that the envelope in which it was inclosed was addressed, and that these letters were put in his pocket by Hulett for the purpose of posting them when he reached the city. These facts, if true, amounted to such a recognition of and assent to the statements contained in the letter as to make them, in effect, the joint declarations and statements of both Hulett and the respondent, and therefore competent as his admissions. It is urged very strenuously by counsel for the appellants that the testimony of the respondent, by which she was thus enabled to connect Hulett with the contents of her letter, impinges upon the statute that it shall not be competent for any party to an action or interested in the event thereof to give evidence therein of or concerning any conversation with or admission of a deceased person relative to any matter at issue between the parties. Gen. St. 1894, § 5660. It was held in *Chadwick v. Cornish*, 26 Minn. 28, 1 N. W. 55, followed in subsequent decisions, that the language of the act refers only to spoken words. If it was a question of first impressions, it might admit of discussion whether the statute ought not to be construed in accordance with the views of the late Chief Justice Gilfillan, so as to include any admission of the party, whether by word or act. The peculiar facts of the present case illustrate the fact that admissions by act may often be as much within the mischief aimed at as admissions by spoken words. But, as the narrower construction placed upon the statute has been adhered to and followed for nearly 18 years, during which the legislature has not seen fit to amend the law, it is now too late for us to reconsider the question.

None of the exceptions to the charge are well taken or of sufficient substance to require discussion. In fact, the charge was, in most respects, a model one. Instead of merely stating general abstract principles of law (as is often the case), which the average lay juror is usually incapable of correctly applying to the facts of the particular case, the learned judge gave the jury the benefit of a very full, clear, and impartial analysis of the evidence, taking up each important branch of it, and explaining to them its bearing upon the issue which they were to decide. This disposes of all the assignments of error relating to the trial of the issue before the jury.

8. When the other issues came on for trial, by stipulation of the parties all the evidence introduced upon the trial before the jury was deemed as introduced, subject to the same objections and exceptions, in the trial by the court. A small amount of additional evidence having been introduced, both appeals were submitted to the court for its decision. The court thereupon made separate findings of fact and conclusions of law in each appeal. The second finding of fact in each case was

to the effect that the deceased and the petitioner were husband and wife, the only difference being that in the one appeal the finding was that they were such on the 7th of January, 1892 (the date of the execution of the marriage contract), and on the 25th of July, 1892 (the date of Hulett's death), while in the other appeal the finding was that they became husband and wife on the 7th of January, 1892; the difference in the two findings being, in our opinion, immaterial. The court held, as conclusions of law, in the one appeal, that the petitioner was entitled, as widow, to an order setting apart to her the homestead of the deceased, etc.; and, in the other, that the will of Hulett, executed in 1862, was revoked by his subsequent marriage to the petitioner. It is to this second finding of fact and to this last conclusion of law that the appellants take exception, and this presents the two principal questions raised by these appeals. The respondent had been for a long time prior to the execution of the marriage contract in the employment of Hulett as housekeeper at his farm at Stoney Point, some miles out of the city of Duluth. Her testimony is that immediately after the execution of this contract she moved into his room, and that from henceforth until his death they occupied the same sleeping apartment, and cohabited together as husband and wife. But she admits that it was agreed between them that their marriage was to be kept secret until they could move into Duluth, and go to housekeeping in a house which Hulett owned in that city. While a feeble effort was made to prove that their marital relation had become known to one or two persons, yet we consider the evidence conclusive that their marriage contract was kept secret, that they never publicly assumed marital relations, or held themselves out to the public as husband and wife, but, on the contrary, so conducted themselves as to leave the public under the impression that their former relations of employer and housekeeper remained unchanged. Upon this state of facts the contention of the appellants is that there was no marriage, notwithstanding the execution by them of the written contract; that, in order to constitute a valid common-law marriage, the contract, although in *verba de præsenti*, must be followed by habit or reputation of marriage,—that is, as we understand counsel, by the public assumption of marital relations. We do not so understand the law. The law views marriage as being merely a civil contract, not differing from any other contract, except that it is not revocable or dissoluble at the will of the parties. The essence of the contract of marriage is the consent of the parties, as in the case of any other contract; and, whenever there is a present, perfect consent to be husband and wife, the contract of marriage is completed. The authorities are practically unanimous to this effect. Marriage is a civil contract *jure gentium*, to the validity of which the consent of parties able to contract is all that is required

by natural or public law. If the contract is made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, in the absence of any civil regulations to the contrary. 2 Kent, Comm. p. 87; 2 Greenl. Ev. § 460; 1 Bish. Mar. & Div. §§ 218, 227-229. The maxim of the civil law was "*Consensus non concubitus facit matrimonium.*" The whole law on the subject is that, to render competent parties husband and wife, they must and need only agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. If cohabitation follows, it adds nothing in law, although it may be evidence of marriage. It is mutual, present consent, lawfully expressed, which makes the marriage. 1 Bish. Mar. Div. & Sep. §§ 239, 313, 315, 317. See, also, the leading case of *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54, which is the foundation of much of the law on the subject. An agreement to keep the marriage secret does not invalidate it, although the fact of secrecy might be evidence that no marriage ever took place. *Dalrymple v. Dalrymple*, *supra*. The only two cases which we have found in which anything to the contrary was actually decided are *Reg. v. Millis*, 10 Clark & F. 534, and *Jewell v. Jewell*, 1 How. 219; the court in each case being equally divided. But these cases have never been recognized as the law, either in England or in this country. Counsel for appellants contend, however, that the law is otherwise in this state; citing *State v. Worthingham*, 23 Minn. 528, in which this court used the following language: "Consent, freely given, is the essence of the contract. A mutual agreement, therefore, between competent parties, *per verba de præsenti*, to take each other for husband and wife, deliberately made, and acted upon by living together professedly in that relation, is held by the great weight of American authority sufficient to constitute a valid marriage with all its legal incidents"; citing *Hutchins v. Kimball*, 31 Mich. 126. Similar expressions have been sometimes used by other courts, but upon examination it will be found that in none of them was it ever decided that, although the parties mutually agreed *per verba de præsenti* to take each other for husband and wife, it was necessary, in order to constitute a valid marriage, that this agreement should have been subsequently acted upon by their living together professedly as husband and wife. In some cases where such expressions were used the court was merely stating a proven or admitted fact in that particular case, while in others the contract of marriage was sought to be proved by habit and repute, and the courts merely meant that the act of parties in holding themselves out as husband and wife is evidence of a marriage. In *State v. Worthingham*, *supra*, which was a prosecution for bastardy, the defendant offered as proof of his marriage to the mother of the child that

during all the time they lived and cohabited together the woman held herself out to her friends generally as his wife, and that both of them represented to the world that they had been married. The point really decided by the court, and evidently the only one it had in mind, was that this was competent evidence of a marriage, and that no formal solemnization or ceremony was necessary to give it validity. The statement in the opinion already quoted is probably subject to the criticism that it does not accurately discriminate between the fact of marriage and the proof of it. The case of *Hutchins v. Kimmell*, supra, cited by this court, does contain such expressions as "followed by cohabitation," and "from that time lived together professedly in that relation"; but this language was evidently used simply as a recital of the actual facts in that particular case. There is nothing in the opinion indicating that the court intended to hold that a mutual, present consent to be husband and wife will not constitute a valid marriage unless followed by cohabitation of the parties, and a holding of themselves out as man and wife. *Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345, and *Id.*, 79 Cal. 633, 22 Pac. 26, 131, is not in point, for the reason that section 55 of the Civil Code of that state provides that "consent alone will not constitute marriage; it must be followed by a solemnization or by a mutual assumption of marital rights, duties, or obligations." In view of the increasing number of common-law widows laying claim (in many instances, doubtless, fraudulently) to the estates of deceased men of wealth, it is a question for the legislature whether the common law should not be changed; but with that the courts have nothing to do.

4. This brings us to the last and most important question in the case, viz. was the will of Hulett revoked by his marriage to the respondent? At common law the marriage of a woman absolutely revoked her will. The reason usually given was that, a married woman having no testamentary capacity, her will was no longer ambulatory. But the marriage of a man did not revoke his previous will in regard to either real or personal estate. This was not considered such a change of condition as would work a revocation by implication or inference of law. The reason usually given was that the law made for the wife a provision independently of the act of the husband by means of dower. But the marriage and the birth of issue conjointly revoked a man's will, whether of real or personal estate; these circumstances producing such a total change in the testator's condition as to lead to a presumption that he could not intend a disposition of property previously made to continue unchanged. The issue, the birth of which would revoke a will, must have been such as could have inherited the property which was the subject of the will, so that the effect of throwing open the property to the disposition of the law would have been to let in the after-born

child or children, for whose benefit alone the implied revocation obtained. The chief reason why marriage and the birth of issue was deemed such a change of condition on part of the testator as would work a revocation of his will was that otherwise his issue, which was the natural object of his bounty, would be wholly unprovided for, differing in that respect from the widow, for whom the law had made provision by means of dower. Hence it seems to have been the rule that marriage and the birth of issue would not produce the revocation of a will where provision was made by the will itself for the children of the future marriage. At common law a married woman could not inherit from her husband. In case of her husband dying intestate, she was not entitled to anything out of his estate except her dower. While by our statutes dower *en nomine* has been abolished, yet the law makes provision for the widow, independently of the act of the husband, much more liberal than the common law did. She is entitled—First, to a life estate in the homestead of her deceased husband, free from any testamentary devise or other disposition to which she shall not have assented in writing, and free from all debts or claims against his estate; second, to an undivided third in fee simple, or such inferior tenure as the deceased husband was at any time during coverture seized or possessed thereof, of one undivided third of all other lands of which the deceased was at any time during coverture seized or possessed, free from any testamentary or other disposition thereof to which she shall not have assented in writing, but subject in its just proportion with other real estate to the payment of such debts of the deceased as are not paid from the personal estate. Of the personal estate of which her husband dies possessed the widow is entitled to all his wearing apparel; his household furniture, not exceeding in value \$500; other personal property to be selected by her, not exceeding in value \$500; a reasonable allowance for her maintenance during administration, which, in case the estate is insolvent, is not to be for more than one year. Gen. St. 1894, §§ 4470, 4471, 4477. Such is the provision which the law makes for the widow. The statute then provides that, where the husband dies intestate, the residue of his estate, real and personal, shall descend and be distributed as follows: First, to his children, and to the lawful issue of any deceased child by right of representation; second, if there be no child, and no lawful issue of any deceased child, then to the surviving wife. It is mainly on this last provision by which the wife may inherit from her husband that counsel for the respondent base their contention that in this state marriage alone will revoke by implication of law the prior will of the husband. Their argument may all be summed up in the proposition that, inasmuch as a widow may now inherit from her husband (which she could not do at common law), therefore marriage alone effects the same change in the condition or circumstances

of the husband as was effected under the common law by his marriage, and the birth of issue who could inherit. The courts of two or three western states have taken substantially this position. See *Tyler v. Tyler*, 19 Ill. 151; *Morgan v. Ireland*, 1 Idaho, 786; *Brown v. Scherrer*, 5 Colo. App. 255, 38 Pac. 427, approved and affirmed in 21 Colo. 481, 42 Pac. 668. In *Tyler v. Tyler*, *supra*, the question was not discussed at any great length, and the weight of that case as authority is somewhat impaired by the fact that in a subsequent case the court placed its refusal to reconsider the question mainly on the ground that the legislature had subsequently enacted that marriage alone, without the birth of issue, revoked a will, and hence that any decision which the court might make would be merely retroactive. The most able and forcible presentation of the arguments on that side of the question is to be found in the opinion of the Colorado court of appeals in *Brown v. Scherrer*, *supra*. But, after carefully considering all that has been said on that side, we are compelled to the conclusion that due weight has not been given to the fact that the main reason why, at common law, marriage and the birth of issue was deemed such a change in the condition or circumstances of the husband as would work an implied revocation of his prior will was that otherwise his issue would be wholly unprovided for,—a thing which it was not to be supposed to have been in the contemplation of the testator; whereas, under our statutes, and, we assume, without special examination, under the statutes of those states in which the decisions cited were rendered, even if the will stands, very liberal provision has been made for the widow, independently of any act of the husband. There is a prevailing sentiment, often expressed by both courts and text writers, that marriage alone should be deemed such a change in condition and circumstances as will revoke a prior will. A statute to that effect was passed in England in 1837 (1 Vict. c. 26), followed by the enactment of statutes to the same effect in many of the states of the Union. How far this sentiment may have unconsciously influenced the decisions referred to it is impossible to say, but no court has ever assumed to hold on this ground alone, and in the absence of legislation affecting the question, that the common-law rule was abrogated, or so far modified, that marriage alone would revoke a will. It is also suggested that the common-law rule had its origin in part in the ancient desire to build upon families and family estates a consideration which has no

place in this country. It is undoubtedly true that many of the doctrines of the common law had their origin in social or political conditions which have in whole or in part ceased to exist. But this fact alone will not usually justify courts in holding that these doctrines, when once thoroughly established, have been abrogated, any more than it would justify them in holding that a statute had been abrogated because the reason for its enactment had ceased. Any such rule would leave the body of the common law very much emasculated; as, for example, that pertaining to real estate. While, undoubtedly, the common law consists of a body of principles applicable to new instances as they arise, and not of inflexible cast-iron rules, yet where the rules of the common law have become unsuited to changed conditions, political, social, or economic, it is the province of the legislature, and not of the courts, to modify them. While we do not wish to be understood as intimating that no condition of legislation upon the subject of the rights of married women in the estates of their husbands would effect by implication a change of the common-law rule, yet our conclusion is that, in view of the main reason upon which the common-law rule was based that marriage alone would not, but that marriage and the birth of issue conjointly would, revoke the prior will of a man, and in view of the very liberal provision made by statute for the widow independently of the act of her husband. The mere fact that she may now, under the statute, in certain contingencies, inherit more from her husband, is not sufficient to warrant us in holding that the common-law rule has been so changed that marriage alone is such a change of condition or circumstances as will work an implied revocation of the prior will of the husband. We should have stated that our statute relating to the revocation of wills is substantially, if not literally, the same as that of 29 Car. II, which has been so generally adopted by the American states. Gen. St. 1894, § 4430.

The conclusion at which we have arrived on this question renders it unnecessary to consider other questions discussed by counsel; as, for example, as to the power of the probate court to set aside the probate of a will. In the appeal from the judgment setting aside to the petitioner the homestead of the deceased, and giving her an allowance out of his estate for her maintenance during administration, the judgment is affirmed. In the other appeal the judgment setting aside the probate of the will, and adjudging such will to be of no force or effect, is reversed.

WATTS v. WATTS.

(36 N. E. 479, 160 Mass. 464.)

Supreme Judicial Court of Massachusetts.
Plymouth. Feb. 27, 1894.

Exceptions from superior court, Plymouth county; Henry K. Braley, Judge.

Libel for divorce by Samuel M. Watts against Ellen M. Watts on the ground of adultery. Judgment dismissing the libel. Libellant excepts. Exceptions sustained.

On the trial it was proved or admitted that on June 4, 1892, libellee committed adultery with one Jeremiah Ford; that she was discovered by libellant, who ejected her from his house; that on June 6, 1892, she brought suit in the probate court, under Pub. St. c. 147, § 33, for separate maintenance; that libellant defended, but offered no evidence of her adultery; that on August 22, 1892, the probate court entered a decree for libellee, reciting that the libellee, "for justifiable cause, was actually living apart from her husband;" that no appeal was taken; and that, at the time of the filing of the libel, said decree was in full force. The court ruled that said decree was a bar to the maintenance of this libel.

Simmons & Pratt, for complainant. Chester M. Perry, for defendant.

KNOWLTON, J. In regard to subjects of which the probate court has jurisdiction, and upon parties brought within its jurisdiction, a decree of that court, like a judgment of other courts, is conclusive. Miller v. Miller, 150 Mass. 111, 22 N. E. 765; McKim v. Doane, 137 Mass. 195; Pierce v. Prescott, 128 Mass. 140; Laughton v. Atkins, 1 Pick. 535.

The decree introduced at the trial, being between the same parties as those in the present action, is binding and conclusive upon them in this suit in regard to all matters shown to have been put in issue, or to have been necessarily involved, in the former suit, and actually tried and determined in it. In regard to matters not then in controversy, and not heard and determined, although it is conclusive so far as the final disposition of that cause of action is concerned, it is not conclusive to prevent a determination of them according to the truth, if they are subsequently controverted in a different case. Foye v. Patch, 132 Mass. 111; Com. v. Evans, 101 Mass. 25; Burlen v. Shannon, 14 Gray, 433-437; Thurston v. Thurston, 99 Mass. 39; Lewis v. Lewis, 106 Mass. 309; Burlen v. Shannon, 99 Mass. 200; Hawks v. Truesdell, Id. 557; Lea v. Lea, Id. 496; Cromwell v. County of Sac, 94 U. S. 351. It would be a harsh and oppressive rule which should make it necessary for one sued on a trifling claim to resist it and engage in costly litigation in order to prevent the operation of a judgment which would be held conclusively to have established against him every material fact alleged and not denied in the declaration, so as to preclude him from showing the truth if

another controversy should arise between the same parties. There might be various reasons why he would prefer to submit to a claim rather than to defend against it. For the purpose of defending that suit he would have his day in court but once, and if he chose to let the case go by default, or with a trial upon some of the defenses which might be made, and not upon others, he would be obliged forever after to hold his peace. But a plaintiff can claim no more than to be given what he asks in his writ. He cannot justly complain that the defendant has not seen fit to set up defenses and raise issues for the purpose of enabling him to settle facts for future possible controversies. In subsequent proceedings which are independent of the original suit, the judgment in that suit is conclusive as evidence, or may be pleaded as an estoppel, only as to those matters which were put in issue and determined; but it is not necessary that these should be particularly mentioned in the pleadings, if they are involved in the issue made up, and if the case is determined upon the trial of that issue. The bill of exceptions in this case shows nothing in regard to the pleadings, further than that there was a petition brought under Pub. St. c. 147, § 33, and that the respondent appeared and defended against it. It appears that no evidence was offered of the act of adultery on June 4, 1892, and we infer that it was not set up in answer to the petition. We must assume that the respondent's pleading was a general denial. Was the question whether the petitioner had committed adultery, as now appears, necessarily involved in the issue made up by an affirmation and denial that she was living apart from her husband for justifiable cause? The grounds of the decree do not appear. Could such a decree have been made upon any possible state of facts, if the petitioner had been known to have committed adultery on June 4, 1892? If so, the decree could not be held to be a bar to a divorce unless the only facts which would render the decree possible are such as would, of themselves, preclude the libellant from obtaining a divorce. The decision that a wife is living apart from her husband for a justifiable cause, made upon a hearing between them on the general issue, conclusively shows that she has not utterly deserted him. Miller v. Miller, 150 Mass. 111, 22 N. E. 765. Living apart from a husband under such circumstances as to constitute utter desertion, for which a divorce may be granted, is a marital wrong, and cannot be legally justifiable. But facts may be supposed upon which the decision of the probate court might have been made in the present case, even if it was known that the wife was guilty of adultery of which the husband had knowledge. If he had for a long time been guilty of extreme cruelty towards her, and had inflicted serious bodily injury upon her when he ejected her from his house, and then had asked her

to return to his home, and had offered to forgive the adultery if she would come back, she would have been justified in refusing to return, on the ground that she had reason to fear great injury from his cruelty if she continued to live with him. If such facts appeared, the court might well decide that she was justifiably living apart from him on account of his cruelty, notwithstanding her adultery, which he was willing to forgive. It is obvious, therefore, that the decision in her favor on the question whether she was living apart from him for a justifiable cause is not necessarily a finding that she was not guilty of adultery; and upon the record before us it cannot be said that her guilt or innocence was necessarily involved in the issue then tried.

It may be said, however, that the facts above supposed are such as would bar his suit for a divorce, and that therefore such an hypothesis cannot help him in this case. It is true that the extreme cruelty of a libelant is a defense to a libel for a wife's adultery. *Handy v. Handy*, 124 Mass. 394; *Cumming v. Cumming*, 185 Mass. 386-389; *Morrison v. Morrison*, 142 Mass. 361, 8 N. E. 59. But there may be other causes which would justify her in living apart from him, less than those which would be a ground for a divorce in her favor. Such causes could not be availed of as an answer to his libel for a divorce on the ground of her adultery, although they might warrant this finding of the probate court. Against this proposition it is argued forcibly, by a prominent author, that no cause should be deemed sufficient to justify withdrawal from cohabitation which is not enough to call for a judicial separation. 1 Bish. Mar., Div. & Sep. § 1753. This, until recently, was the law in England, and it is still the law in some of the American states; but it is now held by the English courts that the use of the words "separation without reasonable cause" in the statute in reference to desertion implies that there may be a separation with a reasonable cause which is something less than the causes for which a divorce may be granted. *Yeatman v. Yeatman*, L. R. 1 Prob. & Div. 489-491; *Haswell v. Haswell*, 1 Swab. & Tr. 502, 29 L. J. Prob. & M. 21. So, too, a voluntary separation of husband and wife is not there deemed to be against public policy, and articles of separation entered into by a husband and wife are enforced by courts of equity. *Wilson v. Wilson*, 1 H. L. Cas. 538; *Besant v. Wood*, 12 Ch. Div. 605; *Hart v. Hart*, 18 Ch. Div. 670. In this commonwealth it has been held that an indenture whereby a husband agrees to pay to a trustee money for the support of his wife, made in contemplation of an immediate separation, which takes place as contemplated, is not

void as against public policy. *Fox v. Davis*, 113 Mass. 255. In *Lyster v. Lyster*, 111 Mass. 327, Mr. Justice Gray says, in giving the opinion of the court: "It has accordingly been held, by a great weight of American authority, that ill treatment or misconduct of the husband of such a degree, or under such circumstances, as not to amount to cruelty for which a wife would be entitled to sue for a divorce against him, might yet justify her in leaving his house, and prevent his obtaining a divorce for her desertion if she did so." See, also, cases there cited. The statute which we are considering (Pub. St. c. 147, § 33) permits the husband as well as the wife to apply to a court to obtain an order "concerning support of a wife, or the care, custody, and maintenance of the minor children," thus implying that the provisions of the statute are not alone for the benefit of a wife whose husband has been guilty of misconduct which would be a cause for a divorce. If, to obtain the benefit of its provisions, a wife were obliged to show misconduct of the husband which would be a cause for a divorce, it would add but little to the provisions of previous statutes under which, in divorce proceedings, she could obtain orders for alimony, and in regard to the custody and support of minor children. We are of opinion that under this statute the wife may show that she is living apart from her husband for a justifiable cause, without necessarily going so far as to show a cause which would entitle her to a divorce, and that the reasons required to warrant the decree of the probate court in the present case were not necessarily reasons which would preclude a husband from obtaining a divorce for adultery from the wife. Precisely what reasons would justify a wife in withdrawing and living apart from her husband, so as to subject the husband to a liability for her support away from his home, under this statute, it is unnecessary in this case to determine; it is enough if the cause is something less than that required to entitle her to a divorce, and therefore less than that which would be necessary to furnish a bar to her husband's libel for her misconduct, if pleaded by way of recrimination. See *Inhabitants v. Franklin*, 160 Mass. 149, 35 N. E. 669. Although ordinarily the question whether she was guilty of adultery would be important evidence on the issue tried in the probate court, the husband might offer to forgive her if she would return, or for other reasons the decision might be made to rest on grounds which would not involve a finding that she was innocent or guilty of that crime. It follows that the judgment of the probate court is not conclusive against the libelant in the present action, and there must be a new trial. Exceptions sustained.

GORMAN v. STATE.

(42 Tex. 221.)

Supreme Court of Texas. Dec. 21, 1875.

Appeal from district court, Goliad county; D. D. Claiborne, Judge.

This was an indictment for assault. There was a verdict of guilty, and the defendant appeals.

Lane & Payne, for appellant. N. G. Kittle, for the State.

MOORE, J. If the minor children of the wife are recognized and treated as members of the family of their stepfather, and are supported and maintained by him, there can be no doubt that he stands to them in loco parentis, and may exercise the control and authority of a parent over them. On the other hand, we think it is equally clear that the mother may interfere, by force, if necessary to do so, to protect her child from cruel treatment, or wanton chastisement or abuse, by either the stepfather or father. Her right to interfere depends upon the fact whether the father has exceeded the just limits of parental authority in the extent and character of the chastisement which he is administering to the child. If he has, the wife, by interfering for the protection of the child, does not become an aggressor. And should the husband repel such interference by an assault upon the wife, he is in the wrong, and must be regarded as the assailant, of the grade and character indicated by the acts and circumstances of the case. If, however, the chastisement of the child does not exceed the just limit of parental authority, the interference of the mother would be unwarranted, and the father is fully justified in using all reasonable and necessary force to protect himself, and to restrain and prevent her interference. But while it is impossible to indicate with critical and exact accuracy the precise amount and character of force and resistance which may be used by the father for his protection and defense, and to prevent the unwarranted interference of the wife and mother with the exercise and discharge of his parental authority and duty, still, if it clearly appears that the husband has assaulted the wife, not in his own defense, or to restrain her unwarranted interference, but to punish and correct her for improper interfer-

ence, then, also, he becomes an assailant, and is liable to be treated as a wrongdoer.

Whether the verdict in this case is justified by the facts, when tested by the law applicable to them, if there is no discrepancy between the indictment and the evidence, need not be discussed by us at this time; for, while we do not intend to undertake an analysis of the charge given, we think it quite evident that it presented a more restricted and limited view of the authority and control which appellant was authorized to exercise over his stepchild than that given him by the law, and the charge of the court, as a whole, was, in our opinion, calculated to divert the attention of the jury from the true issues in this case. On the other hand, the first and second instructions asked by appellant are equally calculated to mislead the jury, and, as asked, were unwarranted by the evidence.

The indictment did not charge that appellant was an "adult male." Evidently, therefore, the only ground upon which he could be convicted of an aggravated assault was that the alleged assault was made with a whip. It was, therefore, improper for the court to instruct the jury, as, in effect, it did, that they were authorized to find him guilty of an aggravated assault, if he was an adult male, and had made an assault upon a female. If, however, the charge of the court was strictly accurate in every particular, we would be compelled to reverse the judgment, upon the ground that it is not sustained by the evidence. The indictment charges appellant with making an assault upon Martha Gorman. The proof shows that the alleged assault was upon Mary Gorman. As no notice was taken by the counsel of this discrepancy in the record between the indictment and statement of facts, it may be that it is the result of inadvertence or carelessness in preparing the transcript. The judgment of the court, however, cannot depend on speculations or probabilities as to the correctness or accuracy of the transcripts upon which we are required to act. If they are erroneous, it is the duty of the parties interested in, or to be affected by, them to point out their errors, and to take the proper steps for their correction. When this is not done, evidently the court must treat and act upon them as being in all things correct, as verified by the clerk.

The judgment is reversed, and the cause remanded. Reversed and remanded.

POWELL v. POWELL.

(29 Vt. 148.)

Supreme Court of Vermont. Chittenden. Dec.
Term, 1858.

Libel for a divorce on account of the alleged willful desertion of the libellee for three years. The facts in the case are sufficiently stated in the opinion of the court, which was delivered by

REDFIELD, C. J. This is a petition for divorce by the husband against the wife, on the ground of desertion. The cause, in the words of the statute, is "for willful desertion for three years." We suppose the desertion, to be willful, must be without any sufficient cause or any cause which the party, upon probable proof, believes to be sufficient, as where one party remains absent from the other upon the *bona fide* belief of misconduct in such party of a character to justify such separation. And it is questionable perhaps, where one party remains absent from the other upon the *bona fide* belief of such cause existing, whether the court should grant divorce from the bonds of matrimony, which is the only species of divorce recognized in our law even upon proof that such cause did not in fact exist, and that the other party had no sufficient reason to believe in its existence. Especially should it be so regarded where the party petitioning had taken no efficient steps to remove such false impression, or had conducted with haste and want of condescension in regard to it.

And in cases where the proceeding in the trial is altogether *ex parte*, as in the present case, we do not feel justified in making the same favorable construction of the evidence which we should be inclined to do where the matter partook more of the adversary character in its trial. In such cases experience will show, we think, that it is safe, as a general rule, to make all reasonable presumptions against the evidence, and thus to conclude that where "it is consistent with all the *150 proof that no cause of divorce should exist to so hold.

In the present case the parties were married some ten or eleven years ago, at Milton, where they lived together a short time, and then removed to the state of New York, where they resided together

till some three years since, when the husband returned to Milton. His wife refused to go with him "to live with him near his relatives." He urged her to return to the state of Vermont, and when he left told her any time when she concluded to come to live with him to let him know, and he would send her money to come with. But she has persisted in her refusal to live with him near his relations, and he seems to have persisted she should do so. This seems to have been the only cause of the separation.

Now, while we recognize fully the right of the husband to direct the affairs of his own house, and to determine the place of the abode of the family, and that it is in general the duty of the wife to submit to such determinations, it is still not an entirely arbitrary power which the husband exercises in these matters. He must exercise reason and discretion in regard to them. If there is any ground to conjecture that the husband requires the wife to reside where her health or her comfort will be jeopardized, or even where she seriously believes such results will follow which will almost of necessity produce the effect, and it is only upon that ground that she separated from him, the court cannot regard her desertion as continued from mere willfulness.

Any man who has proper tenderness and affection for his wife would certainly not require her to reside near his relatives if her peace of mind were thereby seriously disturbed. This would be very far from compliance with the Scriptural exposition of the duty of husbands: "For this cause shall a man leave father and mother and cleave to his wife, and they twain shall be one flesh."

And in the present case, as the wife alleges the vicinity of the husband's relatives as a reason why she cannot consent to come to Milton to live with him, and as every one at all experienced in such matters, knows that it is not uncommon for the female relatives of the husband to create, either intentionally or accidentally, disquietude in the mind of the wife, *151 and thereby to "destroy her comfort and health often, and as there is no attempt here to show that this is a simulated excuse, we must treat it as made in good faith, and if so, we are not prepared to say that she is liable to be divorced for acting upon it.

Petition dismissed.

STATE v. BAKER.

(19 S. W. 222, 110 Mo. 7.)

Supreme Court of Missouri, Division No. 2.
March 28, 1892.Appeal from circuit court, Franklin county;
Rudolph Hirzel, Judge.

Annie Baker, alias Annie Ma Foo, was convicted of mayhem, and appeals. Affirmed.

J. E. Merryman and A. H. Bolte, for appellant. John M. Wood, Atty. Gen., for the State.

GANTT, P. J., (after stating the facts.) As the defendant was convicted under the second count, the instruction as to that count only is here for review. The court charged that the assault must have been made with the intent then and there, feloniously, on purpose, and of malice aforethought, to maim the boy; and that defendant, in pursuance of this intent, did feloniously, on purpose, and of her malice aforethought, cast or throw the corrosive fluid into the eyes of the boy, and did in this way put out his eyes. The court correctly defined the terms "malice," "malice aforethought," and "on purpose"; and correctly defined a very plain statutory offense.

2. The objection to instruction No. 4 is equally unfounded. The court did not assume any fact, but left the jury free to find "that the defendant knowingly and willfully threw some corrosive fluid into the face and eyes of Walter Kelly." If she did this, the court correctly told the jury the law presumed she intended the natural consequence of her act, and from the intentional throwing of such a dangerous instrumentality into the eyes of a child the jury might infer malice. Instructions should be concise. We think this instruction submitted the state's side of the question very clearly, and is not open to the criticism made on it by defendant. Immediately following it, and in the same connection, the court charged the jury that before they could find the defendant guilty they must believe beyond a reasonable doubt that the defendant intentionally or on purpose, and not accidentally, threw the fluid into the boy's eyes; and warned the jury that the law presumed her innocent until she was proven to be guilty of the charge beyond a reasonable doubt. The issue was submitted fairly whether the defendant intentionally or accidentally threw this corrosive substance in the child's eyes. The jury found she did it intentionally.

3. The presumption from flight was properly stated. If the jury found she fled to avoid arrest, it raised a presumption of guilt. If she fled from a mob, then no such presumption arose. State v. Griffin, 87 Mo. 608; State v. Brooks, 92 Mo. 542, 5 S. W. 257, 330.

4. The ninth instruction has been approved so often, it is useless to give either reason or authority for it.

5. There was no error in failing to instruct the jury on the offenses denounced in sections

3489-3492. The evidence for the state, if true, made a case of mayhem alone. The evidence for defendant, if true, entitled her to an acquittal. She was guilty of mayhem or nothing under the evidence in this case.

6. The court properly confined itself to the charge in the indictment, and the offense of which there was evidence in the case.

7. But the defendant earnestly contends that the court erred in not qualifying the seventh instruction by adding thereto these words: "There was no evidence that the defendant's husband disapproved of the acts of the defendant, and, unless that fact is established, the jury should acquit the defendant." And in refusing instruction No. 5, prayed in her behalf, to the effect that if her husband was present the jury must acquit her. The court gave the following declaration: "No. 7. The court instructs the jury that the evidence in this case is sufficient to show that the defendant, at the time of the alleged commission of the crime, was a married woman, and the wife of Ma Foo. Now, even though you may believe from the evidence that the defendant committed the crime as charged in the indictment, yet, if you further believe that she committed the crime in the presence of her husband, Ma Foo, and that he was present at the time when she threw the fluid, then the law, in the absence of other and further culpatory and explanatory evidence against the defendant herself, presumes that she acted under the immediate coercion of her husband, and in such case you will find the defendant not guilty. This presumption of law, however, that a wife, acting in the presence of her husband, is acting under his coercion, and that she is therefore not guilty of a crime committed in his presence, is *prima facie* only, and may be rebutted by other proper evidence in the case. And if, in this case, you believe from all the testimony before you that the defendant was the sole acting party, and committed the crime as charged, without any incitement on the part of her husband, and without his consent, or that the defendant was the sole instigator of the crime, and committed the same as charged in the indictment, then you will find the defendant guilty, even though you may believe that her husband was present when she committed the act." A married woman's responsibility for crime committed in the presence of her husband is variously stated by the text-writers. Blackstone, in his Commentaries, (book 1, p. 444,) says: "And in some felonies, and in some inferior offenses, committed by her through constraint of her husband, the law excuses her; but this extends not to treason or murder." And in his fourth book he says: "And she will be guilty in the same manner of all those crimes which, like murder, are *mala in se*, and prohibited by the law of nature." See, also, Russ. Crimes, (9th Ed.) p. 34. From a close examination and comparison of the cases and the text-writers, the general rule admitted by all seems to be that, if a wife commits any felony, with

the exception of murder and treason, and perhaps some other heinous felonies, in the presence of her husband, it is presumed, in the absence of evidence to the contrary, that she did it under constraint by him, and is therefore excused. *Com. v. Neal*, 1 *Benn. & H. Lead. Cr. Cas.* 81; *Com. v. Neal*, 10 *Mass.* 152; 1 *Bish. Cr. Law*, 452; *State v. Williams*, 65 N. C. 398. But the authorities are equally agreed that this presumption is only *prima facie* and rebuttable. So it is said in *Russell on Crimes*, (pages 32, 33): "But this is only the presumption of law, so that if upon the evidence it clearly appear that the wife was not drawn to the offense by her husband, but that she was the principal inciter of it, she is guilty." "And if she commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of murder, treason, or robbery in company with or by coercion of her husband, she is punishable as if she were sole." And this is the doctrine of all the states in the United States. 1 *Whart. Cr. Law*, § 79; *Seller v. People*, 77 N. Y. 411; *Tabler v. State*, 34 *Ohio St.* 127; *Uhl's Case*, 6 *Grat.* 706; *State v. Williams*, 65 N. C. 398; *Miller v. State*, 25 *Wis.* 384. In Arkansas, by force of a statute, the presence of the husband merely is no defense to the wife unless it "appear from the circumstances of the case that violence, threats, commands, or coercion were used." *Freel v. State*, 21 *Ark.* 212.

It will be observed that learned counsel for defendant desire us to ingraft an additional modification on this rule of evidence, and require the state to go further, and prove that the husband not only was not the inciter or responsible criminal agent in the commission of the crime, but that he actually disapproved it, and, in the absence of evidence of his disapproval, the wife must be acquitted. This is not the law. There is little in the present organization of society upon which the *prima*

facie presumption itself can stand, and certainly nothing calling for any extension of the presumption. The statutory rule in Arkansas, supra, is more in accord with the spirit of the age in which we live. In New York, by the Penal Code of 1881, (sections 17, 24,) the presumption is entirely abolished. In this case, if the wife is guilty at all, she alone committed the criminal act which forever deprived the boy of his eyesight. By her own evidence she exonerates her husband of all complicity in the crime. There is not a semblance of constraint. Her responsibility was fairly submitted to the jury. The instruction gave her the full benefit of the presumption, and the jury must have found she was neither coerced nor constrained by act, deed, or word of her husband to do what she did, but that she acted from her own free will. Had the act resulted in death, under the common-law authorities she would not have been entitled to the benefit of the presumption of constraint. What difference there is in principle between the culpability of one who, on purpose, and of malice aforethought, destroys the sight of a little child, and one who kills, we leave to others to state. We confess we are unable to formulate any. The defendant has been fairly tried, and the jury have convicted her. This was their peculiar province. Even though she must undergo the punishment prescribed, we can but regret for the sake of humanity that she could not have been shown innocent of the charge. At this distance it is hard to conceive of such a crime by a woman, and that woman a mother, with so little provocation or motive.

The remarks of Mr. Harvey did not transcend the bounds of legitimate argument. He expressly subordinated his own views of the law to those expressed by the court in its instructions. Finding no error in the record, the judgment is affirmed. All concur.

STATE v. DOWELL.

(11 S. E. 525, 106 N. C. 722.)

Supreme Court of North Carolina. May 5, 1890.

Appeal from superior court, Rowan county; SHIPP, Judge.

Indictment for an assault with intent to commit rape.

The Attorney General, for the State.

SHEPHERD, J. Ordinarily, precedent is grateful to the judicial mind, as something approved and steadfast, on which it may rest with confidence; but sometimes cases arise of such exceptional enormity that, for the fair name of humanity, the judge would hope to find no counterpart in criminal annals. We incline to believe that the case under consideration is one of such bad eminence. Unmatched in iniquity, as it appears to be, it is hoped, however, that the application of a few elementary principles will harmonize the conclusion to which we have arrived, not only with our moral conceptions of what should be the law, but also with its strict, formal administration.

The facts are abhorrently simple. The white husband of a white wife, under menace of death to both parties in case of refusal, and supporting his threat by a loaded gun held over the parties, constrains a colored man to undertake, and his wife to submit to, an attempted sexual connection. The details of this shocking transaction are so disgusting that we will not stain the pages of our reports with their particular recital. Suffice it to say that, under the coercion of the defendant, Lowery, the colored man, did actually make the attempt. Indeed, he did everything necessary to constitute the crime of rape except actual penetration. Fortunately the fright and excitement rendered him incapable of consummating the outrage, which, as we understand the case, he would otherwise have perpetrated; and, alike fortunately, at perhaps the critical moment, the gun discharging itself in the hands of the unnatural husband, the enforced assailant was enabled to effect his escape.

Under the laws of this state, the offense of an assault with intent to commit rape, although subject to very severe punishment, is technically a misdemeanor; and, there being no degrees in this class of crimes, it must follow that, if the defendant is guilty at all, he must be guilty as a principal. The defendant strangely insists that he is not guilty because he is the husband of the prosecutrix; and he relies as a defense upon the marital relation, the duties and obligations of which he has, by all the laws of God and man, so brutally violated. In our opinion, in respect to this offense, he stands upon the same footing as a stranger, and his guilt is to be determined in that light alone. The person of every one is, as a rule, jealously guarded by the law from any involuntary contact, however slight, on the part of another. The exceptions, as in the case of a parent, or one *in loco parentis*, moderately chastising a child, (State v. Harris, 63 N. C. 1,) or a schoolmaster, a pupil,

(State v. Pendergrass, 2 Dev. & B. 365; and Boyd v. State, an Alabama case, recently reported in 7 South. Rep. 268,) are strict and rare. It was at one time held in our state that the relation of husband and wife gave the former immunity to the extent that the courts would not go behind the domestic curtain, and scrutinize too nicely every family disturbance, even though amounting to an assault. State v. Rhodes, Phil. (N.C.) 458. But since State v. Oliver, 70 N. C. 60, and subsequent cases, we have refused "the blanket of the dark" to these outrages on female weakness and defenselessness. So it is now settled that, technically, a husband cannot commit even a slight assault upon his wife, and that her person is as sacred from his violence as from that of any other person. It is true that he may enforce sexual connection; and, in the exercise of this marital right, it is held that he cannot be guilty of the offense of rape. But it is too plain for argument that this privilege is a personal one, only. Hence if, as in Lord Audley's Case, 3 How. St. Tr. 401, the husband aids and abets another to ravish his wife, he may be convicted as if he were a stranger. The principle is thus tersely expressed by Sir MATTHEW HALE: "For, though in marriage she hath given up her body to her husband, she is not to be by him prostituted to another." Hale, P. C. 629; 2 Bish. Crim. Law, 1135; Lord Audley's Case, 3 How. St. Tr. 401.

It thus appearing, we think beyond all question, that the defendant in this indictment is to be regarded as a stranger, we will further consider the case in that aspect alone. It is contended that, as Lowery acted under coercion, and was for that reason excusable, there was no intent to commit rape, and therefore the defendant cannot be convicted. It will be observed that the intent of Lowery to commit the offense is not determined alone by the presumption that every one is presumed to intend the natural consequences of his act; but he testifies that he did actually attempt to have sexual connection. Here, then, we have a specific, actual intent to commit the foul deed; and can it be that he who constrains the will of another to commit such a crime is to be permitted to shield himself upon the ground that there was an entire absence of criminal intent? If this be true, then one who coerces another to shoot down a third person in cold blood is not guilty of murder, because there was no intent for which the person doing the shooting is criminally responsible. The law in such a case couples the act of the instrument with the felonious intent of the instigator, and in this way he is held guilty of murder; and this is true, also, where the instrument is under the age of seven, and conclusively presumed to be incapable of having any criminal intent. So, too, if one is indicted under our statute for shooting at a railroad train with intent to injure it, and it appears that he coerced another to do the shooting, can it with reason be said that he is not guilty because his instrument did not have an intent to inflict any injury? These and other examples which we could cite from our reports well illustrate the

principle upon which our case depends; and especially is this so when, as we have said, the specific intent is expressly shown by the testimony. We are clearly of the opinion that the unlawful act committed in pursuance of the combined intents of the defendant and his enforced instrument are amply sufficient to sustain the conviction.

While placing our decision upon this ground, we are not prepared to say that, under the circumstances, Lowery would have been excusable had he completed the offense. We leave this as an open question, remarking, however, that the *tabula in naufragio* of Lord Bacon has been well-nigh submerged by judicial and critical casuists. See Whart. Hom. §§ 560, 561, and notes to second edition; U. S. v. Holmes, 1 Wall. Jr. 1.¹ See, also, COLERIDGE, C. J., in the case of the Migniotte, decided in 1884. But mark the diversity: There the displaced struggler for life was, by clinging to the plank, insufficient for two, as much attacking his companion in shipwreck, as if he were firing at him with a pistol. In our case the victim is entirely innocent,—in no way threatening by her act or deed any harm to the attempted ravisher. In this view of the case, let us briefly refer to the authorities. In Broom, Leg. Max. 17, 18, it is said: "In accordance with the principle, *necessitas inducit privilegium*, the law excuses the commission of an act *prima facie* criminal if such act be done involuntarily, and under circumstances which show that the individual doing it was not really a free agent. Thus, if A. by force take the hand of B., in which is a weapon, and therewith kill C., A. is guilty of murder, but B. is excused, though, if merely a moral force be used, as threats, duress of imprisonment, or even an assault to the peril of his life, in order to compel him to kill C., this is no legal excuse." For this is cited 1 Hale, P. C. 434, which seems to be entirely in point. East, in his Pleas of the Crown, (volume 1, p. 294,) undertakes to argue that, "if the commission of treason may be extenuated by the fear of present death, * * * there seems no reason why this offense [homicide, or any of the other capital offenses, of course] may not also be mitigated upon the like consideration of human infirmity." 1 Bish. Crim. Law, 348. To this, however, an answer is found in 4 Bl. Com., 30, where he says: "In time of war or rebellion, a man may be justified in doing many treasonable acts, by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace. This, however, seems only, or at least principally, to hold as to positive crimes, so created by the laws of society, and which, therefore, society may excuse, but not as to natural offenses, so

declared by the law of God. * * * And, therefore, though a man may be violently assaulted, and hath no other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder; for he ought rather to die himself than escape by the murder of an innocent." If this be so, and the crime of rape is considered so heinous as to be punishable in the same way as murder, it would seem that "human infirmity" ought not to be tolerated by our laws to the extent of excusing one for the violation of female virtue on the plea of danger to himself, however great or imminent. For the reasons first stated, we think that the ruling of his honor was correct, and that there is no error.

MERRIMON, C. J. (dissenting). The horrible and detestable purpose of the defendant in doing the acts which constitute the criminal offense committed by him against his wife cannot warrant what I deem a misapplication of well-established principles of criminal law. In the nature of the marriage relation, the husband himself cannot ravish his wife; nor, for like reasons, can he, in a legal sense, assault her with the intent to commit a rape upon her. He can only commit the offense of rape, or that of assault with intent to commit a rape, against his wife, by procuring, aiding, abetting, or encouraging another to commit these offenses. His offense in such case depends, necessarily, upon the perpetration of the principal offense by another party. In this case the negro named did not commit a rape upon the wife of the defendant, nor did he assault her with such intent. There was a total absence of such intent on his part. Then, in the nature of the matter, how can the defendant be chargeable with the particular offense charged against him in the indictment? As the negro committed no assault with intent to commit a rape, so the defendant did not. It is said, shall the defendant go quit? Has he committed no offense? Most unquestionably he shall not go quit. He has committed an offense,—a very serious one. He is chargeable with an assault upon his wife with a deadly weapon, and with the intent to kill, and a like assault upon the negro. It is said the punishment of the offense last mentioned is not adequate. It may be very severe. But it may be said as well that the punishment for the offense as charged is not adequate. This, however, is no argument; not the slightest reason pertinent here. The courts have nothing to do with the punishment of offenders, further than to impose the same in the cases, and as required and allowed by law. I will not pursue the subject further.

¹ Fed. Cas. No. 15,883.

PEOPLE v. SCHUYLER.

(6 Cow. 572.)

Court of Appeals of New York. Feb. Term,
1827.

The defendant was imprisoned for, and convicted of, grand larceny, in stealing the goods of L., at the oyer and terminer for Schoharie county, October 23, 1826. The cause came here on a certiorari, accompanied with a case.

H. Hamilton, for prisoner. Atty. Gen. Talcott, for the People.

CURLA, per SAVAGE, C. J. The prisoner took the goods secretly, and no doubt with an intention to convert them to his own use; but this was done by the consent and at the solicitation of the wife, who had agreed to elope and live with him in adultery. This is urged as reducing the offense to a trespass. So far as the question depends upon authority, we are left to the conflicting opinions of commentators, without any adjudged case in point. The statute of Westminster (13 Edw. I c. 34) is relied on, which enacts thus: "And of women carried away with the goods of their husbands, the king shall have the suit for the goods so taken away." This may mean an abduction with the consent or against the will of the wife. If it be the latter, it strikes one as singular that such a circumstance should reduce an act, which would otherwise be a felony at the common law, to a mere trespass, and that a statute should be necessary to restore it to its proper rank in the scale of crime. It is certainly more consistent with our present ideas on this subject to suppose the statute an affirmation of the common law. Hale and other writers do not assert, with any degree of confidence, that the consent of the wife that the adulterer with whom she elopes should take the husband's goods will reduce

the crime to a trespass. Hale puts the case by a sensible, and is followed by some others. The idea may have grown out of a supposed interest which the wife has in her husband's goods, for it is said, in some books, he endows her at the marriage with all his worldly goods. Russ. Crimes, 26, 27. But I believe it is now universally received as law that she can exercise no control over his goods, except as his agent, and not in her own right. The husband may sell the goods, or give them away, or bequeath them. Her interest is no more than that of a child. In both cases it is a mere expectancy, and in most cases the delivery to a stranger by either would protect him from a prosecution for felony. He has reason to presume the consent of the parent or husband, and acts in good faith. On this principle he would be a mere trespasser, though consent should happen to be wanting. We are happy to find that this is so upon authority. In Dalt. Just. (Nelson's Ed.) p. 504, c. 157, it is said: "So if a man takes another man's wife, with her husband's goods, against the husband's will, this also is a felony." And again: "If a married woman shall deliver to her adulterer her husband's goods, this is a felony in the adulterer." In a note to 1 Hale, P. C. 514, the reason mentioned is that "in such case no consent of the husband can be presumed." Russell approves of this doctrine, and the reason on which it is founded. Russ. Crimes, 27. Here the adulterer did more than merely receive stolen goods from the wife. He assisted in stealing them, carrying some of them out of the house. He had no reason to presume the husband's consent to such a taking, and is plainly guilty of felony.

The court sentenced the prisoner to three years' imprisonment in the state prison at the city of New York, at hard labor.

Rule accordingly.

HENDERSON v. WENDLER et ux.

(17 S. R. 851, 89 S. C. 555.)

Supreme Court of South Carolina. July 19,
1893.

Appeal from common pleas circuit court of Spartanburg county; James Aldrich, Judge.

Action by William Henderson against Adam Wendler and Martha Wendler, his wife. From a judgment of the circuit court dismissing an appeal by defendants from a judgment for plaintiff, rendered by a trial justice, they appeal. Affirmed.

Ralph K. Carson, for appellants. Stan-
yarne Wilson, for respondent.

McGOWAN, J. This was an action in a trial justice court against the defendants "for violently with force and arms and threats outrageously and wrongfully going upon premises occupied and worked by the plaintiff, and driving him therefrom, and disposing thereof, to his damage one hundred dollars." The defendants put in a general denial, and a plea that the defendant Martha was, at the time of the commencement of the action, prior thereto, and now is, a woman, the wife of her codefendant, Adam Wendler, and that husband and wife cannot in law commit a joint tort; but, if the act is done by the wife in the presence of the husband, or with his consent, it is his act, and he alone is responsible. The case was heard by the trial justice, L. E. Farley, Esq., without a jury. The testimony is all in the brief, from which the following general facts appeared: The plaintiff made a verbal contract with the defendants to cultivate in the year 1892 a certain field, about 14 acres of land, belonging to the wife, Mrs. Wendler. The defendants were to furnish a house, stock, and tools; half guano and supplies to be paid for out of plaintiff's share of the crop, which was to be equally divided between the parties. Some preparation for a crop was made, and in the month of April difficulties arose as to rations, and the manner of making the crop. Adam Wendler, as the agent of his wife, claiming the right to control the work, went into the field, which by agreement was to be cultivated by the plaintiff, took possession of it, and plowed up the ground. Mrs. Wendler was with her husband. He plowed, and she walked behind him with a gun. At that time plaintiff was not in the field, but in sight. He seems to have given up the contest for possession of the field, and brought this action for damages. At the close of the testimony the trial justice, after argument, rendered judgment that the plaintiff was damaged "by being forced to give up his crop at that time of the year [April] in the amount of \$25." The trial justice is also of opinion that Martha Wendler, the wife of Adam Wendler, acted with her own free will and accord, and not under compulsion of her husband; and gave judgment against both Wendler and his wife. The defendants ap-

pealed to the circuit court, upon various exceptions, which were heard by his honor, Judge Aldrich, who dismissed the appeal, saying that "upon hearing the appeal herein I concur with the trial justice. I concur in his findings and judgment." From this judgment the defendants appeal to this court upon the exceptions as follows, charging error "(1) in not holding that the trial justice erred in refusing to allow Adam Wendler to testify as to contents of the letter sent to Henderson; (2) in not holding that the trial justice erred in allowing William Henderson to testify as to conduct, conversation, and demand made by Mrs. Wendler for the house after suit was brought; (3) in not holding that the trial justice erred in refusing defendants' motion for a nonsuit; (4) in holding that a husband and wife can be sued for a joint tort except as husband and wife; (5) in holding that a married woman can be made liable for a tort committed in the presence of her husband, without proof that she acted voluntarily; (6) in giving judgment against the defendant Martha Wendler for the tort of her husband; (7) in holding that defendants' conduct was tortious, or that any tort had been committed; (8) in holding that any damages had been sustained by the plaintiff."

This was an action at law for damages, and therefore the judgment of the trial justice without a jury must stand as a special verdict upon the facts of the case, which this court has no right to review or reverse. See Nichols v. Railroad Co., 23 S. C. 604.

Exception 1 charges error on the part of the circuit judge in not holding that the trial justice erred in refusing to allow Adam Wendler to testify as to the contents of a letter he (Wendler) sent to Henderson. It seems that during the controversy about the field which the plaintiff was to cultivate Wendler wrote a letter to Henderson, and sent it by his little daughter. The family of Henderson would not receive the letter, and it was destroyed. There was proof that Henderson never saw the letter, or knew its contents. We are not aware of any principle which required the trial justice to allow Wendler to prove the contents of a letter written by himself to Henderson, but which was never delivered to him, or its contents known to him.

Exception 2 complains of error in not holding that the trial justice erred in allowing William Henderson to testify as to conduct, conversation, and demand made by Mrs. Wendler for the house after suit was brought. The right of Henderson to occupy "the house" was a part of the original contract; and we think that evidence as to the conduct and conversation of Mrs. Wendler, when she demanded possession of the house, after action brought, was admissible. "Whenever the injury is in its nature continuous, and continued after action brought, there can be no question that the party injured is entitled to recover for all damages up to trial." See Puckett v. Smith, 5 Strob. 26, and authorities there cited.

Exceptions 3, 4, 5, and 6 make the point that a married woman cannot be made liable for a tort committed in the presence of her husband, without proof showing that she acted voluntarily and willfully. The doctrine upon the subject of the liability of the husband for the tort of the wife committed in his presence is truly stated in the case of *State v. Houston*, 29 S. C. 112, 6 S. E. 943, as follows: "In the case of *State v. Parkerson*, 1 Strob. 170, Judge Withers, in delivering the opinion of the court, said: 'It is a mistake to affirm that a wife may not be indicted, convicted, and punished in conjunction with her husband. While it is true that if she committed a bare theft, or even a burglary, by the coercion of her husband, she will not suffer punishment, and while it is also laid down that coercion is to be presumed from his presence, still it is quite clear that this is only one of those presumptions or inferences classed as *prima facie* that may be rebutted by testimony, and hence presents a question for the jury,' etc. From this it appears that in this state the question of coercion is an open one," etc. The doctrine has been laid down more fully in volume 9, p. 824, Am. & Eng. Enc. Law, as follows: "(1) If the tort is committed in the presence of the husband, and nothing more appears, it is his

sole tort, as the wife is considered to have acted under his coercion; (2) if the tort is committed in his presence, but she appears to have acted deliberately and freely, it is their joint tort; (3) if the tort is committed in his presence and against his will it is her tort, and he is liable with her; (4) if the tort is committed out of his presence, but by his direction, she is jointly liable with him; (5) if the tort is committed out of his presence, and without his knowledge or consent, he is liable with her." In this case the trial justice found as a fact that Mrs. Wendler "acted with her own free will and accord," and not under compulsion of her husband. That places the case in the second category above stated, when the tort is committed in the presence of her husband, but the wife appears to have acted "deliberately and freely." The land belonged to her; she was active in the business; and we concur with the trial justice and circuit judge that she did not act under the compulsion of her husband, but "deliberately and freely." The judgment of this court is that the judgment of the circuit court be affirmed, and the case remanded to that court to carry out the conclusions herein announced.

McIVER, C. J., and POPE, J., concur.

WOODWARD et al. v. BARNES et ux.
(46 Vt. 332.)Supreme Court of Vermont. General Term.
Montpelier. Oct., 1873.

Exceptions from Franklin county court. This was an action of trespass on the case. A demurrer to the declaration was sustained, and the plaintiffs excepted.

H. R. Start, for plaintiffs. H. S. Royce, for defendants.

ROYCE, J. This action is brought to compel payment for certain goods sold and delivered to the defendant Merritt Barnes' wife. It is admitted in the declaration that the husband, before the sale and delivery of the goods, had given the plaintiffs notice not to sell and deliver goods to his wife; and that he had, at all times, furnished her and her children with the necessaries of life, agreeably to her and their station, or the means or money wherewith to procure the same.

It was held in the suit between the plaintiffs and the husband, 43 Vt. 330, that, to entitle the plaintiff to recover for goods sold and delivered to the wife and children of the husband after they had been forbidden by the husband from selling and delivering goods to them on his credit, they must show that the articles were suitable to the husband's circumstances in life, and were needed for the then present use of his family for their reasonable clothing, sustenance, and comfort, according to his rank and condition in life, and that the husband had so far neglected his duty in this respect, as to make it necessary for some one else to supply his family with such necessities. The

plaintiffs now seek to avoid the effect of that rule, by proof that the goods were procured upon the false and fraudulent representations of the wife, that they were so needed. We do not think this can be done. The rules of evidence affecting the liability of the husband, are the same as they would be in an action *ex contractu*. The principle applies that has always been applied in actions against infants. In those cases it has been held that a plaintiff could not convert an action founded on a contract, into a tort, so as to charge an infant. Jennings v. Rundall, 8 T. R. 335; West v. Moore, 14 Vt. 447; Morrill v. Aden, 19 Vt. 505. Hence, the cause of action stated in the declaration "336 does not entitle the plaintiffs to a judgment.

There is another ground why we think the action cannot be sustained. The general principle, that for the torts or frauds of the wife, an action may be sustained against her and her husband, applies only to torts *simpliciter*, or cases of pure, simple tort, and not where the substantive basis of the tort is the contract of the wife. It was so held in Liverpool Adelphi Loan Association v. Fairhurst et ux., 9 Exch. 420, and in Keen v. Hartman, 48 Penn. 497. The substantive basis of the tort complained of here is, that by the false and fraudulent representations of the wife, they were induced to sell and deliver the goods to her. But for the sale and delivery of the goods, the plaintiffs would have had no legal cause of complaint. So that the plaintiffs' right of recovery is made to depend upon the question, whether any such sale and delivery was made, and this clearly brings the case within the rule above stated.

Judgment affirmed.

BURNS v. KIRKPATRICK.

(51 N. W. 893, 91 Mich. 364.)

Supreme Court of Michigan. April 8, 1892.

Error to circuit court, Delta county; John W. Stone, Judge.

Action by John M. Burns against William Kirkpatrick. Judgment for plaintiff. Defendant brings error. Affirmed.

Action of trespass de bonis asportatis. Plaintiff had verdict and judgment for the value of the goods taken. Plaintiff was a householder living with his family, which consisted of his wife, three children, and his mother-in-law. The defendant is his brother-in-law, and on the evening of December 29, 1890, went to the plaintiff's house. A fight, the occasion and details of which it is unnecessary to give, occurred between them. Plaintiff, evidently getting the worst of the fight, ran away from the house, leaving the defendant there. Mrs. Burns, the defendant, and his brother then removed the household goods from plaintiff's house to the defendant's, after which they were taken by Mrs. Burns to her new home. The defendant relies upon the following errors: (1) The circuit judge erred in rejecting the testimony as to what Mrs. Burns said when she was assisting in removing the property in question; (2) the circuit judge erred in making the sarcastic and irrelevant remark in relation to "saving the property for his sister;" (3) the court erred in charging the jury that the defendant is liable to the plaintiff for the value of the goods taken; (4) the court erred in refusing to charge the jury that if they found the goods in question consisted of household furniture and provision, used by the plaintiff and his wife in their housekeeping, the wife had a joint right of possession with her husband, and, as such, could exercise care and control over the same; (5) that the court erred in refusing to charge the jury that if they found that the defendant took said property and carried it away at the request of the wife, and acted only under her supervision and instruction, and with her aid and assistance, and that said goods had never been out of the custody and control of the wife, the plaintiff could not recover in this action; (6) that the

court erred in refusing to charge the jury that there was no cause of action in this case, and in not directing them to bring in a verdict for the defendant.

T. B. White, for appellant. John Power, for appellee.

GRANT, J. (after stating the facts). 1. The principal defense was that the defendant was acting under the direction of Mrs. Burns; that he did not convert the goods to his own use, and therefore is not liable. The act of removal was a tort, and the defendant is liable, notwithstanding he acted under the direction of Mrs. Burns. The learned circuit judge was therefore correct in instructing the jury to render a verdict for the plaintiff for the value of the goods taken. If Mrs. Burns had a just cause of complaint against her husband, the law provided her a remedy which she should have followed. The defendant, a stranger, had no right to enter the plaintiff's home, drive him therefrom, and then assist her in removing the property, the title to which was in him, though he could not dispose of it without her assent.

2. The court correctly rejected the testimony as to what Mrs. Burns said when the property was being removed. The witness saw the defendant and his brother loading the property on a sleigh, and had a conversation with them, to which he had testified. He had not testified to any conversation with Mrs. Burns. Defendant sought to elicit this conversation on the cross-examination of the witness. Plaintiff was not present, and nothing that she then said could have justified the defendant's action.

3. Mrs. Burns was a witness for the plaintiff, and had testified to the conduct of the defendant on the occasion, and that he had kicked over the table and broken the dishes, when the court remarked, "To save the property, I suppose, for his sister." Even if the remark were error, I do not think it so prejudicial, under the facts in this case, as to justify a reversal. The only question left to the jury was the assessment of damages. Judgment affirmed. The other justices concurred.

BIGAOUETTE v. PAULET.

(134 Mass. 123.)

Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 3, 1883.

Exceptions from superior court.

Action of tort by Noel Bigaouette against Henry Paulet in four counts. The first count was for seduction of plaintiff's wife; the second and fourth were for assaults upon her, and the third was for a rape; whereby plaintiff lost her comfort, assistance, society, and benefit. A bill of exceptions, allowed by the trial judge, was, in substance, as follows: The only witnesses were plaintiff and his wife. The wife testified that plaintiff was a workman in the factory of the Smith American Organ Company, in a subordinate capacity, under defendant, and that they were in the habit of visiting each other occasionally with their wives; that on some occasions, previous to July 5, 1876, defendant told plaintiff's wife that he would turn her husband away from the factory, if she refused to receive defendant's visits; that on July 5, 1876, defendant violently and forcibly ravished her, and that he also immediately showed her a pistol, and threatened to shoot her if she should ever tell her husband; that she was at that time four months pregnant with child; that her child was born on December 11, 1876; that on December 18, 1876, she first told her husband of what had occurred between her and defendant, and three days afterwards plaintiff was discharged from the factory by defendant; that shortly after July 5, 1876, plaintiff saw black and blue marks on his wife's arms and legs, and observed that she was ill; that she had no physician, and they kept no servant to assist her, and that she attended to and performed her ordinary domestic duties in her husband's family up to the time of her confinement, but that her performance of these duties was attended with pain and difficulty to herself. The plaintiff also testified to some of the above facts, and then rested his case. The defendant contended, the foregoing being all the material testimony in the case, that there was not sufficient evidence of loss of the wife's services to enable the plaintiff to maintain this action. The judge ruled that as there was no evidence to support the count charging defendant with seducing plaintiff's wife, and as the evidence applicable to the counts for assault and rape proved that no loss of service was caused to plaintiff, the action could not be maintained, and directed a verdict for defendant. Plaintiff alleged exceptions.

A. Russ and H. B. Sargent, Jr., for plaintiff.
W. P. Harding, for defendant.

W. ALLEN, J. The plaintiff cannot maintain this action for an injury to the wife only. He must prove that some right of his own in the person or conduct of his wife has been violated. A husband is not the master of his wife, and can maintain no action for the loss

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of her services as his servant. His interest is expressed by the word "consortium,"—the right to the conjugal fellowship of the wife, to her company, co-operation, and aid in every conjugal relation. Some acts of a stranger to a wife are of themselves invasions of a husband's right, and necessarily injurious to him; others may or may not injure him, according to their consequences; and, in such cases, the injurious consequences must be proved, and it must be shown that the husband actually lost the company and assistance of his wife. This is illustrated in the statements of injuries to a husband in 3 Bl. Comm. 138, 140, where such injuries are said to be principally three: "Abduction, or taking away a man's wife; adultery, or criminal conversation with her; and beating or otherwise abusing her." The first two are of themselves wrongs to the husband, and his remedy is by action of trespass *vi et armis*. In regard to the other, the author's words are: "If it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of trespass *vi et armis*, which must be brought in the names of the husband and wife jointly; but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of the wife, the law then gives him a separate remedy by an action of trespass, in nature of an action upon the case, for this ill usage, *per quod consortium amisit*, in which he shall recover a satisfaction in damages." He states, as one of the circumstances affecting the damages in an action for adultery, "the seduction or otherwise of the wife, founded on her previous behavior and character."

It is usual in actions for criminal conversation to allege the seduction of the wife, and the consequent alienation of her affections, and loss of her company and assistance, and sometimes of her services; but these are matters of aggravation, except so far as they are the statement of a legal inference from the fact itself, and actual proof of them is not necessary to the husband's right of action. The loss of the consortium is presumed, although the wife may have herself been the seducer, or may not have been living with the husband. A husband who is living apart from his wife, if he has not renounced his marital rights, can maintain the action; and it is not necessary for him to prove alienation of the wife's affection, or actual loss of her society and assistance. See *Chambers v. Caulfield*, 6 East, 244; *Wilton v. Webster*, 7 Car. & P. 198; *Yundt v. Hartrunkt*, 41 Ill. 9. The essential injury to the husband consists in the defilement of the marriage bed,—in the invasion of his exclusive right to marital intercourse with his wife, and to beget his own children. This presumes the loss of the consortium with his wife, of comfort in her society in that respect in which his right is peculiar and exclusive. Although actions of this nature have generally been brought where the alienation of the wife's affections, and actual deprivation of her

society and assistance, have been the prominent injury to the husband, yet it is plain that the seduction of the wife, inducing her to violate her conjugal duties, and injuries arising from that, are not the foundation of the action. The original and approved form of action is trespass *vi et armis*, and, though this form was adopted when the act was with the consent of the wife, it was for the reason, as given by Chief Justice Holt, "that the law indulges the husband with an action of assault and battery for the injury done to him, though it be with the consent of his wife, because the law will not allow her consent in such case to the prejudice of her husband, because of the interest he has in her." *Rigaut v. Gallisard*, 7 Mod. 78, 2 Ld. Raym. 809, Holt, 50. See, also, Bac. Abr. "Trespass," C, 1; Id. "Marriage," F, 2; 2 Chit. Pl. (13th Am. Ed.) 855; Reeve, Dom. Rel. 63. The fact that trespass, and not case, was the form of action, even

when the wrong was accomplished by the seduction of the wife, for the reason that the wife was deemed incapable of consent, and "force and violence were supposed in law to accompany this atrocious injury," indicates that the cause of action arose from acts committed upon the person of the wife, and not from influences exerted upon her mind; that the corrupting of the body, rather than the mind, of the wife was the original and essential wrong to the husband.

We think that this action may be maintained upon the evidence offered, not for the actual loss of comfort, assistance, society, and benefit alleged in the second and fourth counts as consequences of the assaults set forth in them, but for the loss of the consortium with the wife which is implied from criminal conversation with her, whether with or against her will.

Exceptions sustained.

SHAW v. MITCHELL.

(Fed. Cas. No. 12,722, 2 Ware [Dav. 216] 220.)

District Court, D. Maine. Oct. Term, 1843.

This was a petition by Jane Shaw, wife of Alpheus Shaw, who was decreed a bankrupt March 2, 1842, praying that certain notes, which had descended to her from her father, and which were included in the schedule of the bankrupt's property annexed to his petition and delivered to his assignee [Nathaniel Mitchell], may be re-delivered to the administrator of her father's estate, in order that the same may be administered by him and distributed to her as her distributive portion of her father's estate. [The petition was filed by Mrs. Shaw's next friend, S. J. Smith.] The following are the material facts: Mr. Doughty, the father of Mrs. Shaw, died Sept. 4, 1838, leaving four children, and certain notes, secured by mortgage, which was all the property that descended. Mr. Shaw was regularly appointed administrator Dec. 4, 1838. The notes in question came into his hands as administrator, and so remained, nothing having been paid upon them, until the decree of bankruptcy and the appointment of an assignee. They were included in the schedule of his property and delivered to his assignee. No distribution has been made of the estate by the administrator, and no account has been settled at the probate court, but the notes still remain due and unpaid. Mr. Shaw has also filed a petition, that the assignee may be ordered to relinquish the notes and restore them to him in his quality of administrator, to be administered and distributed according to law, and for the payment of the debts of the deceased, if necessary for that purpose. Notice of the petition was acknowledged by the assignee, and the case is submitted to the court on the facts stated in the petitions, which are not controverted.

WARE, District Judge. This case has been submitted on the facts disclosed in the petitions of Mrs. Shaw and the bankrupt, which are admitted to be true, for the purpose of having the rights of the assignee and the petitioner determined by the court.

By the common law, marriage amounts to an absolute gift to the husband of all the personal goods and chattels of the wife, of which she is in possession, at the time of the marriage, in her own right, and also of all that may accrue to her during the marriage. With respect to such of the wife's personal property as is not in possession, as debts due to her by contract, or money coming to her by inheritance, these do not pass to the husband as an absolute gift. 2 Story, Eq. Jur. § 1402. Such choses in action are a qualified gift. He has a right to sue for and recover them, but they do not become absolutely his until he has reduced them into his possession. And the same

principle applies, whether they belong to her at the time of marriage, or accrue to her during coverture. A legacy, or a distributive share of an inheritance, accrues to her, it is true, for the benefit of her husband, but these do not become at once incorporated into the general mass of his property without distinction. They bear an ear-mark, if such an expression may be allowed, by which they are discriminated from his other property; and if he dies without reducing them into his possession, they do not go to his administrator, but survive to the wife, and she is entitled to them against the personal representative of the husband. And the choses in action of the wife, as debts due to her, or stock standing in her name, are not reduced into the husband's possession so as to exclude the wife's title by survivorship, merely by the notes or certificates, that is, the evidences of property coming into his hands. Wildman v. Wildman, 9 Ves. 174. The debts due to the wife are not reduced to the legal possession of the husband until the money is paid, or, having the present power to reduce them into possession, he has assigned them for a valuable consideration. Purdew v. Jackson, 1 Russ. 56; Honner v. Morton, 3 Russ. 65. A judgment in the lifetime of the husband, it seems, is not sufficient, at least unless the suit was in the name of the husband alone. 2 Story, Eq. Jur. § 1405; 2 Kent, Comm. 137. If he dies in the lifetime of the wife before this is done, her choses in action will survive to her and not go to his personal representative. But although the husband has only a qualified interest in his wife's choses in action, he has always the power of making that absolute by a reduction of them into his actual possession; nor does the common law furnish the wife any means of preventing the husband from so reducing them into his possession as wholly to extinguish her separate interest. But courts of equity have long been in the habit of interposing to protect the interest of the wife. Whenever the husband is obliged to seek the aid of a court of equity to obtain possession of the wife's property, the court will give its aid only on the condition, that the husband settle part of the property on the wife, to be held for her benefit, independent of the husband and his creditors. This right of the wife to a reasonable provision out of her own property, for the support of herself and her children, is called the wife's equity. The general principle, on which the court interposes in her favor, is said to be, that he who seeks equity shall do equity; and the present disposition of courts seems to be rather to enlarge than curtail the beneficial operation of the rule in favor of married women. This is the established rule in all cases where the husband himself, or his general assignee, for the payment of debts, or under insolvent laws, or in bankruptcy, is obliged to have recourse to a court of equity to obtain possession of the wife's personal prop-

erty. Ordinarily, it is said, that courts of equity will not interfere to control the husband when using the common remedies of the law to obtain the possession of such property. But it is admitted that this rule is subject to some exceptions. Where a legacy to a wife is sued for in the ecclesiastical courts, it is settled that an injunction will be allowed to enforce the equity of the wife. 2 Story, Eq. Jur. § 1403. And for the same reason it has been said, that a suit at law, for a legacy, or a distributive share of an inheritance which has descended to a married woman, ought to be restrained, because such rights of action are of an equitable nature and of equitable cognizance. 2 Kent, Comm. (4th Ed.) 140; Haviland v. Bloom, 6 Johns. Ch. 178. Indeed, upon the ground on which courts of equity interfere at all, that is, that it is equitable that the wife should have a support secured to her out of her own property and placed beyond the reach of the husband and his creditors, it is not easy to perceive what just and reasonable distinction can be made between her legal and equitable rights of action. And it has been suggested by high authority that no such distinction ought to be allowed, but that the court ought, on the principles of justice, to restrain the husband from availing himself of any means at law, or in equity, from possessing himself of his wife's property in action, except on the condition of making a competent provision for her. 2 Kent, Comm. 139; Story, Eq. Jur. § 1403, note.

From this view of the law, it appears to me that the wife would be entitled to her equity out of this property against her husband. It is property which has descended to her by inheritance. It has never by the

husband been reduced to possession, but was, at the time of the bankruptcy, in the hands of the administrator of the estate of her deceased father. It makes no difference that the husband, in this case, was the administrator. For he holds this property, not in his personal, but in his representative character, and, like every other administrator, is bound to account for it to those who are legally or equitably entitled to it. The case has occurred in which the wife's equity attaches in all its strength, the husband having, by bankruptcy, been deprived of the means of supporting his wife and her children. It is property, as observed by Chancellor Kent, of an equitable nature and of equitable jurisdiction. If the husband had died after the bankruptcy, it is clearly settled that the wife would have been entitled to the whole fund by survivorship. Pierce v. Thornely, 2 Sim. 167. The case appears to me to fall within the general principles on which this jurisdiction is exercised by courts of equity. And as this court, sitting in bankruptcy, has all the powers of a court of general equity jurisdiction, it has the authority to allow the claim of the petitioner. If it would be allowed against the husband, it will be equally against his assignee. An assignment by operation of law in bankruptcy, passes the property in the same plight and condition as it was possessed by the bankrupt himself, and subject to all the equities that affected it in his hands. 2 Story, Eq. Jur. § 1411; Mitford v. Mitford, 9 Ves. 100. What proportion of the property ought to be allowed to the wife, is a proper subject of inquiry before a master, and a reference to a master will be made for that purpose.

VAN NOTE v. DOWNEY.¹

(28 N. J. Law, 219.)

Supreme Court of New Jersey. Feb. Term,
1860.

Argued at November term, 1859, before the CHIEF JUSTICE and HAINES, VREDENBURGH, and VAN DYKE, JJ.

J. D. Bedle, for plaintiff. W. L. Dayton, for defendant.

HAINES, J. This was an action of trespass for breaking and entering the close of the plaintiff, and picking and carrying away a quantity of cranberries then growing and being thereon.

At the Ocean circuit, a verdict was rendered for the plaintiff for the value of the fruit, agreed upon by the parties, and the defendant now seeks to set aside the verdict.

The premises in question had been set off to Ann Woolley, as her dower of and to the real estate of her deceased husband, Adam Woolley, and as such were enjoyed by her until April, 1850, when she married John Van Note, the plaintiff.

By virtue of the marriage contract, the husband became seized of a life estate to the premises in right of his wife, and became entitled to the profits of them during the marriage.

The estate which he thus acquired was such that he could sell or charge it to the extent of his interest. He can take the crops during his life, and his representatives can take, as emblements, the crops growing at his death. 2 Kent, Comm. 184; 2 Bl. Comm. 433.

"By the marriage the husband acquires, and during the marriage enjoys, a freehold interest in his wife's real estate for their joint lives." Macq. Husb. & W. 27; 3 Co. Litt. 305, and note 1. The effect of this is to put the ownership during coverture entirely in the husband's power. Hence he can alienate it at his pleasure, and his conveyance will pass his interest without his wife's consent.

At the marriage he acquired a vested interest, of which he was not divested by the act of 25th March, 1852, for the better securing the property of married women. Nixon, Dig. 466.

The second section of that act provides: "That the real and personal estate, and the rents, issues, and profits thereof, of any female now married shall not be subject to the disposal of her husband, but shall be her sole and separate property as if she were a single female, except so far as the same may be liable for the debts of her husband by any legal lien."

The real estate in question cannot be regarded as the property of the wife within the mean-

ing of the act. On the marriage the husband became seized of it, and he has the exclusive right to its enjoyment during the coverture. To that extent it became his property, and was no longer that of the wife, and so was not affected by the act.

The value of a life estate consists in the profits of it; and those profits belonged to the husband exclusively and absolutely. His interest was not contingent, but vested under and by virtue of the marriage contract.

In the case of Executors of Henry v. Dilley, 24 N. J. Law, 302, the property claimed was a residuary legacy which the husband had not reduced into possession, nor had he done any act indicative of an intention to do so. And it was there held that his interest therein was not vested, but only contingent on his reducing it to possession; that his having neglected to do so up to the time the act took effect, the property remained absolutely in the wife, and so became subject to the act for the better securing of the rights of married women, and that the husband could not recover it.

But in this case the interest was vested in the husband, and subject to his control before the passage of that act. He had the right to gather the crops, and to hold responsible to him any one who without his authority gathered and carried them away.

It is further insisted that the court should have left to the jury the question of fact whether the defendant, who gathered the crop under the direction of the wife, had not an implied license to do so from the husband. But there is no evidence from which such a conclusion could be drawn. The wife had gathered the crops after her second marriage, and had paid the husband for carting them; but that is not a fact from which to infer a license given for the gathering of future crops. The profits of those gathered by the wife were his, and he had a right to exact them of her; and his having allowed her to gather them in previous years gave no authority to the defendant to take them at a subsequent season.

Nor was the legal right of the parties to this property changed by any abuse of the wife by the husband. The defendant thereby acquired no authority to take the profits, even for the support of the wife. It is not like the case of one furnishing necessaries for the support of a wife, and who thereby acquires a right of action against her husband.

If she has been abused or abandoned she may have redress in a proper tribunal, but this is not the mode of redress to be resorted to.

The rule to show cause must be discharged.

VREDENBURGH and VAN DYKE, JJ., concurred.

¹ Opinion of Chief Justice Green omitted.

PEMBERTON'S LESSEE et al. v. HICKS.¹

(1 Bin. 1.)

Supreme Court of Pennsylvania. Dec. 23, 1799.

At March term, 1798, it was argued by H. Tilghman, for plaintiff, and by Mr. Dallas, for defendant. At December term, 1798, by Mr. Lewis, for plaintiff, and by Mr. Ingersoll, for defendant.

* * * * *

YEATES, J. Whether the premises in question were forfeited during the life of Joseph Galloway by his having issue previous to his attainer, which happened before the decease of his wife, depends on the words of the law of 6th March, 1778.

What then was the estate of Joseph Galloway in these lands, in the life of his wife, after the birth of their daughter?

It has been contended by the defendant, that though the estate of the husband be not consummate until the death of the wife, yet that it hath such a beginning after issue had in the life of the wife as is respected in law for divers purposes: First, after issue had he should do homage alone and become tenant to the lord by the old feudal law. Secondly, if after issue the husband maketh a feoffment in fee and the wife dieth, the feoffee shall hold it during the life of the husband, and the heir of the wife shall not during his life recover it in a "sur cui in vita;" for it would not be a forfeiture, since the estate at the time of the feoffment was an estate of tenancy by the courtesy initiate though not consummate. Co. Litt. 30a; Ley. 9, 10. It is therefore insisted that Galloway in this case had more than an estate for life in these lands; and that as he could grant them for the term of his own life, he could forfeit his interest therein for the same term. The husband by having issue is seised in his own right for life, and yet is seised in fee in right of his wife, and so as he is not a bare tenant for life; he therefore shall after issue receive and do homage alone during the life of the wife. Co. Litt. 67a. As soon as a child was born the father began to have a permanent interest in the lands, which was not liable to be determined by the subsequent death or coming of age of the infant. 2 Bl. Comm. 127. He might do many acts to charge the lands. Id. 128. So in Plowd. 264, it is said by Weston, J., that if a woman takes husband and has issue and lands descend to her and the husband enters he is entitled to be tenant by the courtesy.

I frankly confess my sentiments on this subject have undergone a material change since the last argument. The definition of courtesy by Littleton (section 35) is that it takes place on the death of the wife, the husband surviving her. So in 2 Bl. Comm. 126, it is said the husband shall, on the death of the wife, hold the lands for his life as tenant by the courtesy

of England; and many other books pursue the same expressions. According to Lord Coke the estate is not consummate until her decease. Co. Litt. 29a. Such then is the legal as well as vulgar acceptation of the terms "estate by the courtesy;" that it does not completely vest until the wife's death. 2 Bac. Abr. 219; Doct. & Stud. dial. 2c, 4 fol. 115.

The reason why under the feudal system the husband shall receive and do homage alone, during his wife's life, after issue had, is his having a seisin in fee in right of his wife; for as a mere tenant for life he shall not do homage. Litt. § 80. And this seems the true ground why the feoffment of the husband, after a child born, shall not be a forfeiture: his future interest and title to be tenant by the courtesy is involved and passes by it to the feoffee; though not to such purpose as to make him tenant by the courtesy which none but the husband himself can be. 2 Bac. Abr. 219. If he was merely tenant for life, his feoffment in fee would clearly be a forfeiture.

The husband may have a permanent interest in the land on the birth of a child, for certain purposes, but not for others. It may not be affected by any event happening to the child; but his inception of estate derived from such child may be extinguished by a subsequent civil disability, to take the land on the termination of the life of his wife.

In the English edition of Plowden (254) so much applauded by Hargrave in his note on Co. Litt. 23a, it is said in the marginal note of the case above cited, that though the title of the husband is initiate by the seisin of the wife, it is not consummate nor begins to have any effect until her death.

Nor is it universally true that because an interest may be granted, it may therefore be forfeited. This consequence is denied by Lord Coke arguendo in Venable's and Harris's Case, 2 Leon. 126. He says: "A man seised in right of his wife may grant but not forfeit. The husband may grant a term for years, which he hath in right of his wife, but he cannot forfeit it. A woman inheritrix taketh a husband, who afterwards is attainted of felony; the king pardons him; they have issue;—the husband shall be tenant by the courtesy; which prooveth that he king hath not the freehold by that attainer." Popham, who argued for the crown in the same case, concurs in denying the same consequence. 4 Leon. 112. So, also, Croke, in Lord Sheffield and Radcliff's Case, Godb. 316.

The plaintiff's counsel have insisted that the case before the court has already received a determination, and is not now open to be argued on general principles. They rely on the Year Book 13 Hen. VII. 17, which runs thus: "A man marries a feme inheritrix and has issue; he commits felony of which he is attainted; the king pardons him; Kebble said that he should not be tenant by the courtesy by reason of the issue had before the attainer; but if he had other issue afterwards, he shall." It must I conceive be admitted, if these positions are re-

¹ Opinion of Shippen, C. J., and dissenting opinion of Smith, J., omitted.

ceived as settled law, and of course a rule of property, that they establish the plaintiff's claim.

I find from Dugdale's *Chronica Series* (75) contained in his *Origines Juridicales*, that Keble was called as a sergeant in the first year of Hen. VII., and in the same Year Book 14 Hen. VII. 7. in the 2d line, he is styled one of the king's sergeants. The dictums of Keble in 16 Hen. VII. 8, are cited with approbation in many books; as Fitzh. Nat. Brev. 84 A, 98 B, 456 F. The assertions of eminent counsel, uncontradicted at the time, or by subsequent cases, have always been received as evidence of the law; such dictums are often repeated in the Year Books, and in the reports of Plowden and Coke particularly. Glyn, C. J., in *Foster v. Ramsay*, 2 Sid. 150, expresses himself thus. "Our very case was put by Stephens, the defendants' counsel, *Rex v. Borlston*, Noy. 159, and not denied by the court; though Fleming, who argued on the other side, denied it." Both the counsel who argued in Noy, 159, 168, admit the authority of the case in question; and Coventry, attorney general, in 2 Rolle, 340. Lord Sheffield v. Radcliff, Godb. 323, s. c., also admits it. It is moreover cited in Co. Litt. 391b, in margin; by Allen in *Foster v. Ramsey*, 1 Keb. 217; and by Lord C. J. Bridgman, Id. 701, s. c. It is so much relied on by Sergeant Hawkins in his second part of *Pleas of the Crown*, § 49, p. 457, c. 49, that he reasons from it as a settled case, against even Lord Coke's opinion. The case is likewise recognized in his P. C. 196, and is there said to accord with the opinion of Justice Fitzherbert; by Brooke, Abr. tit. "Tenant by the Curtesy," pl. 15; by 7 Vin. Abr. 162, pl. 4, and 4 Vin. Abr. 273, pl. 20; and by Lord Chief Baron Comyns in the 3d volume of his Digest, 244. In *Terms de la Ley*, first published in 1583, sub voces "Curtesie of England," the doctrine is set forth at large, but no authority is cited, though the words in the Year Book are used.

The assertions of Sergeant Keble are also warranted by analogy drawn from other books. Thus in Perkins, § 387, if the husband commits treason, felony, or murder, and is attainted, this shall oust the wife of dower; but if after the attainder the husband purchases his charter of pardon, then of all such estates of inheritance of which the husband is seised after his pardon, which the issue, that he may by possibility have by his wife, may inherit by the common law, she shall have dower &c.; for notwithstanding she was his wife at the time of attainder, yet the issue which the husband may have by her after his pardon, is inheritable. If a son and heir be outlawed in the time of his father, and afterwards in the life of his father procures his pardon, and then his father dies, he shall not have his lands by descent, but the lord of whom they are held shall have them by escheat. Fitzh. Abr. "Discent," 17; Trin., 13 Edw. I. So if the eldest son be attainted of felony and obtains a pardon in the life of his father, who afterwards dies, the land shall escheat, because the pardon cannot avoid

the corruption of blood. Brooke, Abr. "Discent," pl. 44, 8 E, 1. Pardon restores not to blood (without an act of parliament) except as to issue begotten afterwards. Co. Litt. 8a, 391b, 392a; S. P. C. 195; 3 Co. Inst. 233; Wm. Jones, 34; 1 Hale, Hist. P. C. 358. A person attainted, though he hath a pardon, cannot claim by descent. Cro. Car. 477; Bacon's *Use of the Law*, 140, 1. Thus, it appears to me, that the authority of the case in 13 Hen. VII. 17, is fully vindicated, as well from the uncontradicted arguments of counsel and of judges, and its adoption by elementary writers of the first reputation, as from the general principles and analogy of the law. To adopt the language of Judge Moreton in 1 Mod. 40, as to another resolution (*Harding v. Warner, Latch*, 24), "The case has walked through all the courts of Westminster Hall undisturbed."

But the present case rests not solely on this authority: it is fully settled that tenants by the curtesy and in dower come in by descent, merely by act of law. Co. Litt. 18b. Now in all cases (except intails) attainder of treason or felony corrupts the blood, upwards and downwards, so that no person that must make his derivation by descent to or through the party attainted, can inherit. Co. Litt. 8a, 84b, 392a; 1 Hale, Hist. P. C. 356, 358; Dyer, 274. And though an alien may take by purchase by his own contract, that which he cannot retain against the king, yet he is not enabled to take by act in law; for the law which does nothing in vain, will not give an inheritance or freehold by act in law where it cannot be kept; and therefore the law will not give descent, curtesy dower, guardianship. And in respect of this incapacity he does resemble a person attainted, with this difference, that the latter is a person whom the law takes notice of, and therefore the eldest son attainted surviving the father shall impede the descent to the younger son. Collingwood v. Pace, 1 Vent. 417, per Lord Chief Baron Hale; s. c. and s. p. 1 Keb. 672; s. p. Strange, 332, by counsel arguendo.

Here then as to Joseph Galloway the vinculum of descent was destroyed by his political offence. To use the expressions of Mr. York in his considerations on the law of forfeiture (page 88): "Bound as he was to the community by nature, moral duty, and experience, he disclaimed the law and was disclaimed by it; by his own voluntary act, he has shewn himself an alien in affection." He therefore shall not be admitted to the legal right of descent; his title shall never arise even for the benefit of the commonwealth; and the estate of his late wife shall be discharged forever of his claim.

This was the reasoning of Coventry, attorney general, who would not readily have given up the rights of the crown, in Lord Sheffield v. Radcliff. The husband by attainder of treason or felony, forfeits his right as tenant by the curtesy by way of discharge; or as the same case is reported in 2 Rolle, 340, if the husband commits felony or treason, he forfeits the dower of his wife, and yet this is a thing in action,

and goes in discharge or surrender. 13 Hen. VII. 17. A man takes a woman inheritrix to wife, and has issue and commits felony, he shall forfeit his tenancy by the curtesy.

It appears therefore that Joseph Galloway was legally incapable of taking the premises in question after the decease of his wife, by right of descent as contradistinguished from purchase. His claim was intercepted by his attainer, and could not take effect by his civil death any more than if he had paid the common debt of nature. But the case is otherwise as to his daughter; for where a person attainted hath issue by a woman seised of lands of inheritance, such issue may inherit to the mother, though he or she never had any inheritable blood from the father. 2 Hawk. P. C. 457, and the cases there cited. So children born after the father's attainer may be heirs to each other on the principle of Collingwood v. Pace, that the children of an alien may be heirs as between themselves though not as to the father. Harg. Co. Litt. 8a, note 5, 12a, note 7. Con-

sequently if the father had no capacity to take the lands the daughter would become entitled thereto as heir of the mother, though in the life of the father.

A few cases yet remain to be cited which I soon shall pass over. Where the husband commits treason the common law gives a forfeiture of the inheritance of the wife only during the coverture. It was otherwise by statute 26 Hen. VIII. c. 18, as to treason; but it is now remedied by 5 & 6 Edw. VI. c. 11; Jenk. Cent. 287; Staundif. P. O. 187. Vide Co. Litt. 351a; Parsons v. Pearse, Poll. 51. As to lands of inheritance if the husband be seised in right of his wife, and is attainted of treason, the king hath the freehold during the coverture. 1 Hale, Hist. P. C. 251. And Lord Coke asserts the same doctrine in his 8 Inst. 19.

On the whole I am of opinion that judgment be entered for the plaintiff.

SMITH, J., dissenting.

* * * * *

THOMPSON v. MORROW.

(5 Serg. & R. 289.)

Supreme Court of Pennsylvania. Sept. Term,
1819.

TILGHMAN, C. J. The record in this case presents two bills of exception, taken on the trial of this cause in the court of common pleas of Allegheny county. It is an action of dower, brought by Elizabeth Thompson, widow of Moses Thompson, deceased.

1. A deed from the said Moses Thompson and Elizabeth his wife (the plaintiff), conveying in fee simple the land in which dower is now demanded, to Robert Henderson, under whom the defendant claims, having been given in evidence by the defendant, the court were of opinion, that by virtue of this deed, the plaintiff was barred of her dower, although it did not appear, that she was privately examined by the justice of the peace who took her acknowledgment. This point having been decided in the case of Kirk v. Dean, 2 Bin. 341, and that decision recognised by this court in several subsequent cases, it is unnecessary, at present, to say anything more, than that we consider the law as settled. There was error, therefore, in the decision of the court of common pleas.

2. After the conveyance by Moses Thompson to Robert Henderson, the land in which dower is claimed (being a lot of ground in the city of Pittsburgh) was increased in value by the erection of buildings; and the value was, besides, greatly increased by the growth of the city, and other causes distinct from any buildings or improvements made by the purchaser. The court of common pleas were of opinion, that in assigning dower to the plaintiff, no regard was to be had to the gradual increase of value from causes unconnected with improvements made by the purchaser, but that the plaintiff was to have one-third, according to the value at the time of the alienation by Moses Thompson. It is a point of great importance to widows, and to all those who purchase from married men without legal conveyances from their wives; we have, therefore, had it twice argued, in order that we might avail ourselves of the industry and talents of the learned counsel on both sides.

Dower is a claim founded on law, and favored by courts both of law and equity. It is a right flowing from marriage; and marriage is so highly regarded as to be a valuable consideration for the settlement of property on the wife. By marriage, the husband acquires an absolute right in his wife's personal estate, a right to the possession and profits of her real estate during the coverture, and also a right to her real estate during his life, in case he survives her, provided he has issue by her, and the estate be of such a nature, that the issue may, by possibility, inherit it. In return for all this, the law gives to the wife, in case she survives her husband, one-third, for her life, of all the real estate whereof her husband was seized at any time during the coverture, wheth-

er she have issue by him or not, provided the estate be of such a nature, that any issue which might have been born, might, by possibility, have inherited it. The right of dower is inchoate, on the marriage, but not consummate till the death of the husband. No act of the husband can lessen or defeat it. But, during the marriage, his right is absolute; he may improve the estate or suffer it to lie waste; erect buildings or pull them down at his pleasure. All that the wife can claim, where the husband dies seized, is one-third of the land in the condition in which it is found at the time when her title is thus complete, viz. at the death of her husband. But if, after her title is thus complete, and before assignment of dower, the heir erects buildings or makes other improvements, the widow shall be endowed of one-third part of the estate, according to its value at the time dower is assigned to her; because it was the folly of the heir to make improvements on land which he knew to be subject to dower. Co. Litt. 32a, § 36.

The law is different, however, when the husband alienates the land during coverture, for there the wife shall derive no advantage from any improvement made by the alienee. There is no injustice in this, for, if the husband had never alienated, he might not have made these improvements. And it would affect the prosperity of the country, by discouraging improvements in building and agriculture, if the wife were to be endowed of one-third of the value, including these improvements. This I take to have been the main reason for excluding the wife from any part of the value arising from improvements; although we find in the old books another reason assigned, that is to say, that as the tenant in dower, who vouches the heir on a warranty of his ancestors, must recover of the heir, according to the value of the land, at the time of the alienation, it would be unreasonable that the widow should recover of the tenant according to any other value. So far as concerns improvements made by the alienee, it is agreed that the tenants shall be protected from this hardship; but as to any value which may chance to arise from the gradually increasing prosperity of the country, and not from the labor or money of the alienee, it would be hard indeed upon the widow, if she were precluded from taking her share of it. She runs the risk of any deterioration of the estate, which may arise either from public misfortune or the negligence or even the voluntary act of the alienee; for although he destroy the buildings erected by the husband, the widow has no remedy, nor can she recover any more than one-third of the land as she finds it at the death of her husband. Perk. Conv. § 829.

There are not many authorities on this subject to be found in the English books, and such as we have are bottomed on decisions said to be reported in the Year Books. Mr. Hargrave, in his note on Co. Litt. 32a, § 36, cites 1 Hen. VII.; 17 Edw. III.; 17 Hen. III. "Dower," 192; 31 Edw. I. "Vouch." 288. "If the feoffee

improve by buildings, yet dower shall be as it was in the seisin of the husband, for the heir is not bound to warrant except according to the value as it was at the time of the feoffment; and so the wife would recover more against the feoffee, than he would recover in value, which is not reasonable." It is to be remarked that the decision in the cases here cited was upon improvements by buildings erected by the feoffee; the decision, therefore, was clearly right, although a better reason might, perhaps, be given, than that which is said to be assigned for it, in the Year Books. In Jenk. Cent. pp. 34, 35, case 68, in which the Year Book 47 Edw. III. 22, is cited, we have the law laid down as follows: "On voucher, if special matter be shewed by the vrouchee, viz. that the land, at the time of the feoffment, was worth only £100, and now, at the time of the voucher, is worth £200, by the industry of the feoffee, the tenant shall recover only the value, as it was at the time of sale, for if the act of the feoffee has meliorated the land, this shall not prejudice the feoffor in his warranty." Here is satisfactory reasoning indeed. The warrantee shall not, by any acts of his own, increase the responsibility of the warrantor, for that would, in effect, be to alter the contract of warranty. But even granting that the tenant, who vouches the heir, can recover from him only according to the value at the time of the alienation, this being the true construction of the warranty, the wife of the feoffee, who is no party to the warranty, ought not to be injured by it. So far as her rights are concerned, she ought not to be affected, but by those reasons of policy and justice, which apply to her case; reasons which extend only to improvements made by the feoffee.

As the Year Books are principally relied on, by those who contend that the widow is to recover according to the precise value at the time of the alienation, I endeavored to trace the subject through those books, but met with great difficulty, from the imperfection of the printed editions. I believe, I have seen all which have ever been printed but it appears by a report of a committee of the British house of commons appointed for the purpose of inquiring into the state of the public records, in the year 1800, that although there are Year Books from the reign of Edward I. (inclusive) to the 1st of Henry VIII., yet, in the printed editions there are the following chasms: The whole reign of Edward I. (except some short notes in the exchequer); of the reign of Edward III., ann. 11 to 16, ann. 19, 20, and 31 to 37; whole reign of Richard II.; of Henry V., ann. 3, 4, and 6; of Henry VII., ann. 17, 18, 19. And it appears from the same report, that in some instances the manuscripts contain different reports of the same cases. It is to be remarked in general of such reports as we have in these books, that they are often so short as to be obscure and unsatisfactory.

With respect to dower, however, I have found no adjudged case in the Year Books confining the widow to the value at the time of the alienation by her husband where the question did not arise on improvements made after the alienation.

In our own state it does not appear that the point now in question has been decided, although I have certainly considered the general understanding to be that the widow should have the advantage of all increase of value not arising from improvements made after the alienation. And such I know to have been the opinion of my deceased colleagues, Judges Yeates and Brackenridge. As to the case of Winder v. Little, 1 Yeates, 152, although the point on which the court decided is not expressly stated, yet enough appears to satisfy me that it was a question on improvements. By the supreme court of New York, justly commanding the highest respect, the law has been held differently. But they have a statute of their own by which this matter is regulated. It is true that court, in delivering its opinion, did say, that the statute made no change in the common law; still, however, the decision was upon the statute, and therefore what was said of the common law ought not to be considered as more than a dictum. The New York cases on this subject will be found in 2 Johns. 484; 11 Johns. 510; 13 Johns. 179. In Massachusetts, the supreme court have in several cases decided that, so far as concerns buildings or other improvements, the widow shall take her third according to the value, exclusive of the improvements. 9 Mass. 218, Id. 8, 10 Mass. 80, 13 Mass. 227. But as to increase of value not arising from improvements, the opinion of the late Chief Justice Parsons may be collected from what fell from him, in the case of Gore v. Brazier, 3 Mass. 544. His words are these: "If the husband, during coverture, had aliened a real estate in a commercial town, and at his death the rents are trebled, from causes unconnected with any improvement of the estate, and the widow should then sue for her dower, perhaps it might be difficult for the purchaser to maintain that one-ninth only, and not one-third, should be assigned to her." I am not aware that this opinion has ever been contradicted in Massachusetts, and therefore I presume that the law is held there in conformity to it. Having considered all the authorities which bear upon this question, I find myself at liberty to decide, according to what appears to me to be the reason and the justice of the case, which is, that the widow shall take no advantage of improvements of any kind made by the purchaser, but, throwing those out of the estimate, she shall be endowed according to the value at the time her dower shall be assigned to her. The judgment is, therefore, reversed and a *venire facias de novo* awarded.

Judgment reversed and a *venire facias de novo* awarded.

SCHNEEBLY et al. v. SCHNEEBLY.

(26 Ill. 118.)

Supreme Court of Illinois, April Term, 1861.

Error to Peoria circuit court.

C. Ballance, for plaintiffs in error. Manning & Merriman, for defendant in error.

WALKER, J. The commissioners appointed by, and acting under the decree of the court, assigned to the widow as her dower in the various tracts embraced in the decree, the El. $\frac{1}{2}$ N. W. 27, 9 N., 8 E., and 88 acres on the west side, part of the northeast quarter of the same section. These premises included the residence and homestead of the husband in his lifetime. They also report that the premises thus allotted are one-third in value of all the lands with perfect title, having reference to quantity and quality. It is urged by plaintiffs in error, as one of the grounds of reversal, that wild, unimproved and unproductive lands are not, under our statute, subject to dower. The first section of the dower act provides that "a widow shall be endowed of one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form."

By this provision it is the character of the title, or rather the nature of the estate held in the land, which determines the right. It is not the accidental condition of the property which controls, but the interest or the extent of the title. The legislature has not declared that the widow shall be endowed of all improved or productive real estate of which the husband was seized during the marriage, but it is of all the lands of which he was seized of an estate of inheritance. And in making this provision, the general assembly have no more than declared the common law. It is true that in giving dower in equitable estates, and in land purchased by the husband in his lifetime, and not paid for until after his death, the right has been enlarged; but as such estates are not involved in this case, there is no occasion for their discussion.

There seem to be obvious reasons for the enactment. After the assignment of dower, the widow may undeniably use and enjoy the portion allotted to her in any mode she may choose, provided she shall not commit waste. She may reclaim lands that have been once cultivated and abandoned; she may reduce prairie land to cultivation, and may pasture timber land. And no one will deny that by that means she may derive profit without committing waste. These are doubtless sufficient considerations for the enactment. But be that as it may, we have no hesitation in saying that the legislature designed to give, and has given the widow dower in unimproved as well as improved lands, of which the husband was seized of an estate of inheritance during the marriage.

It is likewise urged, that the statute has not authorized the court through commissioners to

assign dower in a portion of lands in lieu of dower in the whole. As in declaring the right, our statute has only enacted the common law, we must look to it for the rules regulating its assignment, unless it is otherwise provided for by the act. Park, in his treatise on Dower (page 255) says that: "In the simple state of property in former times, it is probable that the only provision that was made for the security of the dowress was, by requiring that the sheriff should assign to her a third part of each existing denomination of property. Thus he was bound to assign her a third part of each manor, if there were several; or a third part of the arable, a third part of the meadow, and a third part of the pasture." And it is said in Bac. Abr. 374, letter D: "If a woman be dowable in three manors, and accept of the heir one of these manors in lieu of dower in all of the rest, this is good, though against common right, which gives her but the third part of each manor." And Rolle, Abr. 683, is referred to in support of the doctrine. We thus see that the common law, or common right, as it is sometimes called by the ancient writers, gave to the widow one-third part of each particular tract. Whilst this is true, it also permitted the heir and the widow, by mutual consent, to allot a specific tract in lieu of dower in several parcels, and when so assigned, the law upholds and enforced it between the parties. But its validity depended alone upon the agreement, as neither could be compelled by the law to make such an assignment.

And in this country, the courts, so far as we have found, have adopted the same rule. Scott v. Scott, 1 Bay, 504; Coulter v. Holland, 2 Har. (Del.) 330; Sip v. Lawback, 17 N. J. Law, 442. But it may be that cases are to be found which announce a different rule, although we have not been referred to them, if they exist. It however seems to us, that when considered upon principle, that it is more reasonable, just and convenient, that each tract should bear the burthen of the widow's dower, annexed to and growing out of it. If the dower in all of several tracts may be imposed upon one or more, to the relief of others, it might be made to operate with great injustice to purchasers or heirs. In case of purchasers of several tracts without any relinquishment by the widow, it would be highly unjust to endow her out of the portion purchased by one, and to exempt the other. It would be equally wrong to impose the whole of the widow's dower in the estate upon the portion of one heir, and exempt the others. If this might be done, purchasers would be disinclined to pay the value of real estate at sales by executors and administrators, of real estate subject to the widow's dower. And yet they have no power to compel its assignment.

Again, under our statute this widow's dower is an incident to the land held by a particular description of title. It attaches to all of the lands alike held by that description of title, and not to a portion of them. By the marriage the right attaches to the lands then held, and as others are subsequently acquired, it attaches to

them, and not to those previously owned. And by the husband's death the right becomes consummate, as it originally attached to each separate parcel, and we are aware of no statute or rule of the common law that will permit the court or the commissioners, without the consent of the parties, to release one portion from the burthen and impose it upon another. If the parties choose to do so, they have the unquestioned right, or if the commissioners were to so assign it, and it were approved by the court without objection, where the parties were not under disability, or if by their report it appeared that the parties in interest consented, and it were not disproved, such an assignment would be good. But without such agreement by parties capable of assenting, when objected to, the court should set aside the report and refer it back to the same or other commissioners.

In assigning the widow's dower, the commissioners should so allot it, having reference to quantity and quality, that her portion shall be equal in its yearly value or income to one-third of the yearly value of the tract from which it is taken. They should not consider the intrinsic or cash value, or the yearly income, but its capacity at the time for produc-

tion, and assign to her such a portion as will produce one-third of that value. If after such an assignment the profits are increased by her expenditure of money or labor, it is her compensation for the expenditure.

That this is the true rule seems to be manifest from the provisions of the 28th section of the dower act. It provides that in case the property is not susceptible of a division and the commissioners shall so report, the court shall impanel a jury and ascertain its yearly value, and render judgment that the widow shall be paid on a day named, one-third of the amount annually, during her natural life. This provision proceeds upon the principle that it is one-third of the yearly value and not one-third of the number of acres, or the cash value of the land of which she is to be endowed.

For the reason that the assignment of dower in this case was not of the one-third part of such tract, and was a part of two tracts only, the decree of the court below affirming the report of the commissioners must be reversed, and the cause remanded, with instructions to refer it back to the same or other commissioners.

Decree reversed.

THORNBURG et al. v. WIGGINS et ux.
(34 N. E. 999, 135 Ind. 178.)

Supreme Court of Indiana. Oct. 19, 1893.
Appeal from circuit court, Randolph county; Leander Monks, Judge.

Action by Daniel S. Wiggins and wife against William H. Thornburg and others to enjoin a sale under execution. Demurrs to the complaint were overruled, and defendants appeal. Reversed.

Thompson, Marsh & Thompson, for appellants. Watson & Watson and J. L. Engle, for appellees.

DAILEY, J. This was an action instituted in the court below, in two paragraphs, in the first of which appellees allege, in substance, that on and before December 15, 1884, one Lemuel Wiggins was the owner of a certain tract of real estate, therein described, containing 80 acres; that on said day said Lemuel and his wife, Mary, executed and delivered to the appellees a warranty deed, conveying to them the fee simple of said real estate; that at the time of said conveyance the appellees were, ever since have been, and now are, husband and wife; that said deed conveyed to the appellees the title to said real estate, which they took and accepted, ever since have held, and now hold by entirieties, and not otherwise; that appellees hold their title to said real estate by said deed of Lemuel Wiggins, and not otherwise; that on the 24th day of April, 1877, Isaac R. Howard and Isaac N. Gaston, who were defendants below, recovered a judgment in the Randolph circuit court for the sum of \$403.70 and costs against one John T. Burroughs and the appellee Daniel S. Wiggins as partners doing business under the firm name of Burroughs & Wiggins; that on May 12, 1886, said Howard and Gaston caused an execution to be issued on said judgment, and placed in the hands of the appellant Thornburg, as sheriff of said county, and directed him to levy the same on said real estate, and that said sheriff did, on the 25th day of May, 1886, levy said execution on said real estate, or on the one-half interest in value thereof taken as the property of said appellee Daniel S. Wiggins, to satisfy said writ; that pursuant to the levy thereof said sheriff proceeded, by the direction of said Howard and Gaston, to advertise said real estate for sale under said execution and levy to make said debt, and did on the 8th day of June advertise the same for sale on the 3d day of July, 1886, and will on said day sell the same unless restrained and enjoined from so doing by the court; that said Daniel S. Wiggins has no interest in said premises subject to sale thereon; that the appellees hold the title thereto as tenants by entirieties, and not otherwise; that the sale of said tract on said execution would cast a cloud on the appellees' title, etc. The second paragraph is the same as the first in substantial averments, except that in this paragraph the appellees set out as a part thereof a copy of the deed under which they

claim title to said real estate as such tenants by entirieties. The granting clause of the deed is as follows: "This indenture witnesseth that Lemuel Wiggins and Mary Wiggins, his wife, of Randolph county, in the state of Indiana, convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins, his wife, in joint tenancy," etc. Appellants separately and severally demurred to each paragraph of the complaint, and their demurrers were overruled by the court, to which the appellants excepted, and, refusing to answer the complaint, judgment was rendered in favor of appellees on said demurrers. Appellants appeal, assigning as errors the overruling of said demurrers, and urge that the appellees under the deed took as joint tenants, and hence that the husband's interest is subject to levy and sale upon execution.

A joint tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent, in rents and profits; but upon the death of one his share vests in the survivor or survivors until there be but one survivor, when the estate becomes one in sevralty in him, and descends to his heirs upon his death. It must always arise by purchase, and cannot be created by descent. Such estates may be created in fee, for life, or years, or even in remainder. But the estate held by each tenant must be alike. Joint tenancy may be destroyed by anything which destroys the unity of title. Our law aims to prevent their creation, and they cannot arise except by the instrument providing for such tenancy. *Griffin v. Lynch*, 16 Ind. 398. 9 Am. & Eng. Enc. Law, 850, says: "Husband and wife are, at common law, one person, so that when realty vests in them both equally, * * * they take as one person; they take but one estate, as a corporation would take. In the case of realty, they are seized, not per my et per tout, as joint tenants are, but simply per tout; both are seized of the whole, and, each being seized of the entirety, they are called 'tenants by the entirety,' and the estate is an estate by entirieties. * * * Estates by entirieties may be created by will, by instrument of gift or purchase, and even by inheritance. Each tenant is seized of the whole; the estate is inseverable, cannot be partitioned; neither husband nor wife can alone affect the inheritance; the survivor takes the whole." This tenancy has been spoken of as "that peculiar estate which arises upon the conveyance of lands to two persons who are at the time husband and wife, commonly called 'estates by entirety.'" As to the general features of estates by entirieties there is little room for controversy, and there is none between counsel. Our statute re-enacts the common law. *Arnold v. Arnold*, 30 Ind. 305; *Davis v. Clark*, 26 Ind. 424. Strictly speaking, estates by entirieties are not joint tenancies (*Chandler v. Cheney*, 37 Ind. 391; *Hulett v. Inlow*, 57 Ind. 412), the husband and wife being seized, not of moieties, but both seized of the entirety per tout, and not per my (*Jones v. Chandler*, 40 Ind. 589; *Davis v. Clark*, supra; *Arnold v.*

Arnold, *supra*). It has been said by this court in some of the earlier decisions that no particular words are necessary. A conveyance which would make two persons joint tenants will make a husband and wife tenants of the entirety. It is not even necessary that they be described as such, or their marital relation referred to. *Morrison v. Seybold*, 92 Ind. 302; *Hadlock v. Gray*, 104 Ind. 596, 4 N. E. 167; *Dodge v. Kinzy*, 101 Ind. 102; *Hulett v. Inlow*, 57 Ind. 414; *Chandler v. Cheney*, 37 Ind. 395. But the court has said that the general rule may be defeated by the expression of conditions, limitations, and stipulations in the conveyance which clearly indicate the creation of a different estate. *Hadlock v. Gray*, *supra*; *Edwards v. Beall*, 75 Ind. 401. Having its origin in the fiction of common-law unity of husband and wife, the courts of some states have held that married women's acts extending their rights destroyed estates by entirety, but this court holds otherwise (*Carver v. Smith*, 90 Ind. 226); and the greater weight of authority is in its favor. Our decisions hold that neither alone can alienate such estate. *Jones v. Chandler*, *supra*; *Morrison v. Seybold*, *supra*. There can be no partition. *Chandler v. Cheney*, 37 Ind. 391. A mortgage executed by the husband alone is void (*Jones v. Chandler*, 40 Ind. 391), and the same is true of a mortgage executed by both to secure a debt of the husband (*Dodge v. Kinzy*, 101 Ind. 105); and the wife cannot validate it by agreement with the purchaser to indemnify in case of loss arising on account of it (*State v. Kennett*, 114 Ind. 160, 16 N. E. 173). A judgment against one of them is no lien upon it. *Ditching Co. v. Beck*, 99 Ind. 250; *McConnell v. Martin*, 52 Ind. 434; *Orthwein v. Thomas* (Ill. Sup.) 13 N. E. 564. Upon the death of one, the survivor takes the whole in fee. *Arnold v. Arnold*, *supra*. The deceased leaves no estate to pay debts (*Simpson v. Pearson*, 31 Ind. 1); and during their joint lives there can be no sale of any part on execution against either (*Carver v. Smith*, *supra*; *Dodge v. Kinzy*, 101 Ind. 105; *Hulett v. Inlow*, 57 Ind. 412; *Chandler v. Cheney*, *supra*; *Davis v. Clark*, *supra*; *McConnell v. Martin*, *supra*; *Cox's Adm'r v. Wood*, 20 Ind. 54). The statutes extending the rights of married women have no effect whatever upon estates by entirety. *Carver v. Smith*, 90 Ind. 223. Such estate is in no sense either the husband's or the wife's separate property. The husband may make a valid conveyance of his interest to his wife, because it is with her consent. *Enyeart v. Kepler*, 118 Ind. 34, 20 N. E. 539. The rule that husband and wife take by entireties was enacted in this territory in 1807, nine years before Indiana was vested with statehood, and has been repeated in each succeeding revision of our statutes. It has thus been the law of real property with us for 86 years. Section 2922, Rev. St. 1881, provides that "all conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common, and not

in joint tenancy, unless it be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint tenancy." Section 2923 provides that the preceding section shall not apply to conveyances made to husband and wife. Under a statute of the state of Michigan, similar in all its essential qualities to our own, the court held that, "where lands are conveyed in fee to husband and wife, they do not take as tenants in common" (*Fisher v. Provin*, 25 Mich. 347), they take by entireties. Whatever would defeat the title of one, would defeat the title of the other. *Manwaring v. Powell*, 40 Mich. 371. They hold neither as tenants in common nor as ordinary joint tenants. The survivor takes the whole. During the lives of both, neither has an absolute inheritable interest; neither can be said to own an undivided half. *Insurance Co. v. Reah*, Id. 241; *Allen v. Allen*, 47 Mich. 74, 10 N. W. 113.

While the rule of entireties was predicated upon a fiction, the legislative intent in this state has always been to preserve this estate, and has continued the peculiar statute for this purpose. Estates by entireties have been preserved as between husband and wife, although joint tenancies between unmarried persons have been abolished, so as to provide a mode by which a safe and suitable provision could be made for married women. *Carver v. Smith*, 90 Ind. 227. "Where a rule of property has existed for seventy years, and is sustained by a strong and uniform line of decisions, there is but little room for the court to exercise its judgment on the reasons on which the rule is founded. Such a rule of property will be overruled only for the most cogent reasons, and upon the strongest convictions of its incorrectness. * * * It is evident that the legislature of 1881 did not intend to repeal the statutes establishing tenancies by entireties. They simply intended to enlarge in some particulars the power of the wife, which existed already under the Acts of 1852 and the years following. * * * It did not abolish estates by entireties as between husband and wife, but provided that when a joint deed was made to husband and wife they should hold by entireties, and not as joint tenants or tenants in common." *Carver v. Smith*, *supra*. In *Chandler v. Cheney*, 37 Ind., on page 396, the court says: "It was a well-settled rule at common law that the same form of words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entirety. The rule has been changed by our statute above quoted." The whole trend of authorities, however, is in the direction of preserving such tenancies, where the grantees sustain the relation of husband and wife, unless from the language employed in the deed it is manifest that a different purpose was intended. Where a contrary intention is clearly expressed in the deed, a different rule obtains. "A husband and wife may take real estate as joint ten-

ants or tenants in common, if the instrument creating the title use apt words for the purpose." 1 Prest. Est. 132; 3 Bl. Comm., Sharswood's note; 4 Kent, Comm., side page 363: I Bish. Mar. Wom. § 616 et seq.; Freem. Coten. § 72; Fladung v. Rose, 58 Md. 13-24. "And in case of devise and conveyances to husband and wife together, though it has been said that they can take only as tenants by entireties, the prevailing rule is that, if the instrument expressly so provides, they may take as joint tenants or tenants in common." Stew. Husb. & Wife, §§ 307-310; Tied. Real. Prop. § 244. "And as by common law it was competent to make husband and wife tenants in common by proper words in the deed or devise," etc. (Hoffman v. Stigers, 28 Iowa, 310; Brown v. Brown, 133 Ind. 476, 32 N. E. 1128), "so it seems that husband and wife may by express words be made tenants in common by gift to them during coverture" (McDermott v. French, 15 N. J. Eq. 80). In Hadlock v. Gray, 104 Ind. 599, 4 N. E. 167, a conveyance had been made to Isaac Cannon and Mary Cannon, who were husband and wife, during their natural lives, and the court say: "The language employed in the deed plainly declares that Isaac Cannon and Mary Cannon are not to take as tenants by entirety. The result would follow from the provision destroying the survivorship, for this is the grand and essential characteristic of such a tenancy. * * * The whole force of the language employed is opposed to the theory that the deed creates an estate in fee in the husband and wife." The court further say: "It is true that where real property is conveyed to husband and wife jointly, and there are no limiting words in the deed, they will take the estate as tenants in entirety. * * * But, while the general rule is as we have stated it, there may be conditions, limitations, and stipulations in the deed conveying the property which will defeat the operation of the rule. The denial of this proposition involves the affirmation of the proposition that a grantor is powerless to limit or define the estate which he grants, and this would conflict with the fundamental principle that a grantor may for himself determine what estate he will grant. To deny this right would

be to deny to parties the right to make their own contracts. It seems quite clear upon principle that a grantor and his grantees may limit and define the estate granted by the one and accepted by the other, although the grantees be husband and wife." The court then adopts the language of Washburn (1 Washb. Real Prop. 674) and Tiedeman, *supra*. In Edwards v. Beall, *supra*, the court hold that when lands are granted husband and wife as tenants in common they will hold by moieties, as other distinct and individual persons would do. If, as contended by appellees, the rule prevail that the same words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entireties, then it would result as a logical conclusion that husband and wife cannot be joint tenants, because by this rule, words, however apt or appropriate to create a joint tenancy, would, in a conveyance to husband and wife, result in an estate by entireties; joint tenancy would be superseded or put in abeyance by the estate created by law, —tenancy by entirety. The result of such reasoning would be to destroy the contractual power of the parties where this relationship between the grantees is shown to exist. Any other process of reasoning would carry the rule too far, and we must hold it modified to the extent here indicated. Husband and wife, notwithstanding tenancies by entirety exist as they did under the common law, may take and hold lands for life, in joint tenancy or in common, if appropriate language be expressed in the deed or will creating it; and we know of no more apt term to create a joint tenancy in the grantees in this estate than the expression "convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins in joint tenancy." These words appear in the granting clause of the deed conveying the land in question, and the estate accepted and held by the grantees is thereby limited, and they hold, not by entireties, but in joint tenancy. A joint tenant's interest in property is subject to execution. Freem. Ex'n, 125. Judgment reversed, with instructions to the circuit court to sustain the demurrer to each paragraph of the complaint.

GREGORY v. PIERCE.

(4 Metc. 478.)

Supreme Judicial Court of Massachusetts.
1842.

Assumpsit on a promissory note, signed by the defendant in the presence of an attesting witness, dated October 6th, 1825, and payable to Putnam & Gregory, partners, of whom the plaintiff is survivor.

The case was submitted to the court of common pleas, on an agreed statement of facts, as follows: "The defendant was married to Varney Pierce, Jr., in 1806, who, in 1816, became insolvent, and left her and went out of the commonwealth, and did not return till 1818, when he came back and remained with her about a week. He then left her and went to Ohio, where he remained till his death in 1832. He made no provision for the support of his wife and family, after he left her in 1816; but she supported herself and family, after he left her, by her own labor, contracting debts and making contracts in her own name. Putnam & Gregory employed her to do work for them, and supplied her with necessaries for the support of herself and family; and the note in suit was given for the balance of account between the parties."

The court of common pleas rendered judgment for the plaintiff, and the defendant appealed to this court.

Wells & Davis, for plaintiff. Mr. Brooks, for defendant.

SHAW, C. J. The principle is now to be considered as established in this state, as a necessary exception to the rule of the common law, placing a married woman under disability to contract or maintain a suit, that where the husband was never within the commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts, and sue and be sued in her own name, as a feme sole. It is an application of an old rule of the common law, which took away the disability of cōverage when the husband was exiled or had abjured the realm. *Gregory v. Paul*, 15 Mass. 31; *Abbot v. Bayley*, 6 Pick. 89. In the latter case, it was held, that in this respect, the residence of the husband in another state of these United States, was equivalent to a residence in any foreign state; he being equally beyond the operation of the laws of the commonwealth, and the jurisdiction of its courts.

But, to accomplish this change in the civil relations of the wife, the desertion by the husband, must be absolute and complete; it must be a voluntary separation from and abandonment of the wife, embracing both the

fact and intent of the husband to renounce de facto, and as far as he can do it, the marital relation, and leave his wife to act as a feme sole. Such is the renunciation, coupled with a continued absence in a foreign state or country, which is held to operate like an abjuration of the realm.

In the present case, the court are of opinion, that the circumstances stated are not sufficient to enable the court to determine whether the husband had so deserted his wife, when the note in question was given. The only facts stated are, that he was insolvent when he went away; that he was absent, residing seven or eight years in Ohio; that he made no provision for his wife and her family, after 1816; and that she supported herself and them by her own labor. But it does not appear that he was of ability to provide for her; that he was not in correspondence with her; that he declared any intention to desert her, when he left, or manifested any such intention afterwards; or that he was not necessarily detained by sickness, imprisonment or poverty.

The fact of desertion by a husband may be proved by a great variety of circumstances leading with more or less probability to that conclusion; as, for instance, leaving his wife, with a declared intention never to return; marrying another woman or otherwise living in adultery, abroad; absence for a long time, not being necessarily detained by his occupation or business, or otherwise; making no provision for his wife, or wife and family, being of ability to do so; providing no dwelling or home for her, or prohibiting her from following him; and many other circumstances tending to prove the absolute desertion before described. The general rule being that a married woman cannot make a contract or be sued, the burden of proof is upon the plaintiff to show that she is within the exception. In an agreed statement of facts, such fact of desertion, using this term in the technical sense above expressed, as a total renunciation of the marriage relation, must be agreed to, or such other facts must be agreed to, as to render the conclusion inevitable. If the facts stated are all that can be proved in the case, the court would consider that the plaintiff had not sustained the burden of proof, and therefore could not have judgment. See *Williamson v. Dawes*, 9 Bing. 292; *Stretton v. Bushnach*, 4 Moore & S. 678, 1 Bing. 139; *Bean v. Morgan*, 4 McCord, 148. But apprehending that the statement may have been agreed to, under a misapprehension of the legal effect of the facts stated, and that other evidence may exist, the court are of opinion, and do order, that the agreed statement of facts be discharged, and a trial had at the bar of the court of common pleas.

PARTRIDGE et al. v. STOCKER et al.
(36 Vt. 108.)

Supreme Court of Vermont. Windsor. Feb.
Term, 1863.

Appeal from chancery court, Windsor
county.

*William W. Howard and Julius Con-
verse, for the orators.*

*Andrew Tracy, for the defendant Ward-
ner.*

KELLOGG, J. The proof of the existence of the partnership of the orators at the time when their account against Mrs. Adelia A. Howard, the wife of Ralph Howard, one of the defendants, accrued, rests upon the second deposition of Edson E. Plimpton, one of the orators. This deposition was filed in the clerk's office on the 26th of August, 1861, and, on the 16th of September following, the defendant Wardner, who is the only defendant who appeared and answered in this cause, filed a motion to suppress the deposition for reasons assigned. It appears that on the 1st of October following, the solicitor for the orators gave a written notice to the defendant's solicitor to proceed to a hearing on this motion before the final hearing on the merits of the case, so that, in case of the suppression of the deposition, the orators might have an opportunity to retake it before the final hearing. This motion was not pressed forward by the defendant until the final hearing at the December Term, 1861. Three of the reasons assigned for the allowance of this motion relate to mere formal irregularities in the taking, signing, and certifying of the deposition; and a deposition ought not to be suppressed for a failure to comply with the rules in a mere matter of form, unless such failure proceeds from bad faith, rather than from accident and mistake. The only ground upon which such a *110 motion should be allowed is that of preventing injury and advancing justice; and it is apparent that to suppress testimony for inaccuracies of form merely would lead to neither of these results. The remaining reason assigned for the allowance of this motion is that the witness did not answer certain cross interrogatories proposed by the defendant, but we think that the witness answered with reasonable fulness to all of the cross interrogatories which are specified as being insufficiently answered, and that this objection is not well taken in fact. A motion to suppress testimony is, under ordinary circumstances, addressed wholly to the discretion of the chancellor, and is one of those incidental questions in practice which must rest mainly in discretion. Such questions are ordinarily not revisable even upon chancery appeals, *Lovejoy v. Churchill*, 29 Vt. 151. The chancellor having overruled this motion, and, for aught that appears in the case, having done this in the strict and proper exercise of his discretion, we find no occasion to revise his decision. Even if this question could be raised on appeal from his decision, we should be entirely satisfied to hold that a motion to suppress testimony, after a

notice from the adverse party to bring it on before the hearing in chief, should be so brought on, or that it should not be entertained on the hearing in chief. We regard the decision of the chancellor overruling this motion as being a very proper application of his discretion to the facts and circumstances of the case. 2 *Daniell's Ch. Pr.*, (Perkins Ed.) 1188; *Underhill v. Van Cortlandt*, 2 Johns. Ch. R., 345; *Skin-
ner v. Dayton*, 5 Johns. Ch. R. 191; 8 *Greenl. Ev.*, §§ 352, 353.

This preliminary question being thus disposed of, the orators' proof of the existence of their partnership during the time when their account against Mrs. Howard accrued becomes full and satisfactory; for it appears by this deposition that the orators' firm or partnership was formed on the 1st of September, 1859, and was not changed after that time until this account had accrued. Although the first of the written articles of partnership provides that the partnership was to continue for three years from the 14th of January, 1860, yet those articles were made on *111 *the 1st of September, 1859, and recite that the partners had at that time contributed distinct sums to the capital stock, and the partnership appears to have had an actual existence from that time. This fact of the actual existence of the partnership previous to the 14th of January, 1860, should control any apparent ambiguity arising from the provisions of the first article; but that article in terms refers to the time of the duration or continuance of the partnership and not to the time of its commencement, and, thus construed, it is entirely consistent with the orators' claim that their partnership actually commenced on the 1st of September, 1859.

In the court of chancery the defendant Wardner alone appeared and made defence in this case, and the orators' bill was taken as confessed by each of the other defendants. Since the suit was removed to this court by appeal, the deaths of William B. Partridge, one of the orators, and of Nic-
anor Kendall and Mrs. Adelia A. Howard, two of the defendants, have been duly suggested, and the suit is now prosecuted by the surviving orators against the surviving defendants.

The case presented by the orators' bill as a ground for the relief prayed for depends entirely upon the facts which should be treated as established by the testimony. We have not been able to arrive at entire unanimity of opinion in respect to some of the facts which are controverted, but, in the judgment of a majority of the court, the results of the testimony establish, with reasonable distinctness and certainty, the following facts, viz: Mrs. Adelia A. Howard, the wife of the defendant Ralph Howard, commenced in the fall of 1856, to carry on the millinery business in the village of Windsor in her own name. Her husband appears to have advised her not to go into this business before she engaged in it, but, by his conduct, if not by his express declarations, he consented that the business should be commenced, carried on, and managed in her name. He was engaged in the business and trade of a tailor, and his declarations as well as hers show that

it was the understanding between them that the millinery business should be carried on as a separate and distinct *business from his, and that she was "112 not to use or pledge his credit in managing the business. Accordingly, she leased rooms for the purpose of carrying on the business and paid the stipulated rent for the rooms so leased, and when she and her husband were occupying rooms in the same building,—the one for the millinery and the other for the tailoring business,—they each separately paid their respective proportions of the rent. The entire millinery business was conducted in her name and under her personal management. She bought and sold the goods and controlled the business of her shop, and employed the hands at work in it, and settled with and paid them from time to time. She usually went to Boston in the spring and fall of each year to make purchases of goods and stock for her shop, and frequently ordered goods from the parties with whom she dealt in Boston to be forwarded to her by express; and the goods came invariably in packages marked with or addressed to her name. Money was obtained by her for the purpose of making purchases of goods and stock for her shop when she went to Boston from time to time as above stated, on notes discounted at the bank in the village in which she was carrying on the business; and these notes were, except in a single case, signed by her as principal, while the name of her husband appears upon only one of them. All of these notes were paid either by her, or out of money which she furnished from the proceeds of the business of her shop. All of the purchases made for her shop were made on her credit, and not upon her husband's; and, when he and she dealt with traders in the vicinity, separate accounts were kept by such traders with her and with him. He furnished some goods for the millinery shop at different times, and perhaps rendered other assistance to his wife in carrying on her business, but it is quite clear from the testimony that the amount of his contributions or advancements to the millinery shop was not large, and that he was fully repaid for the same by money or other property taken from the shop. She continued to carry on the millinery business from the time of commencing the same as above stated up to some time in January, 1860, when, by reason of her failing *health, she became confined "113 to the house, and was unable to personally superintend the shop. While she was thus carrying on this business, she was accustomed to buy goods for her shop of the orators, who were importers and manufacturers of silk and straw millinery goods in Boston; and, when she first commenced purchasing such goods of the orators, she represented to them that she was doing business by herself, without receiving any help from her husband. For the goods which she purchased of the orators, they gave credit to her only, and not in any manner or part to him. At the time of the commencement of this suit, she was indebted to the orators on account of millinery goods sold and furnished by them to her, previous

to the transfer made by her husband to the defendant Wardner, in the sum of \$127.26. Many of the goods so furnished by the orators to her were in the millinery shop when the goods in that shop were transferred by her husband to the defendant Wardner. We are irresistibly led to the conclusion that, as between her and her husband the millinery business should be regarded as entirely separate from his business; and that this was the express understanding between them at the commencement and during the entire continuance of that business. Upon this part of the case, the actions and conduct of Mrs. Howard and her husband are even more convincing and are justly entitled to more influence, than their declarations. He suffered her to set up the business in her own name, and to manage it at her own discretion. He had nothing to do with making the purchases, or keeping the accounts, or paying the debts of the business, and he never had any communication with those of whom she made her purchases, and never discovered any interest in the state of their accounts; and when he had the temporary charge of the millinery shop, in the sickness or absence of his wife, he represented to others that he was taking care of the business for his wife, and that he carried to her all the money which he received in the business of that shop. His actions and conduct can be interpreted only by the fact that he consented to the setting up of this millinery business by his wife as a distinct "114 and separate business from his, and that there was a distinct understanding between them that he was not to have any thing to do with that business. This view of the facts, if it needed corroboration from his cotemporary declarations, is strongly supported by his declarations as proved by the testimony of Messrs. Stearns, Winn, Ensworth, Kendall and Simonds. Soon after the commencement of Mrs. Howard's sickness, and early in February, 1860, she sent a message to the orators, through Mr. Kendall, desiring them to secure their claim against her on the goods then remaining in the millinery shop; and, in consequence of this request, they sent forward their account against her to an attorney, who caused the goods to be attached on a writ in favor of the orators against her husband. This attachment appears to have been made without specific instructions from the orators, and solely for the purpose of creating a lien upon the goods. But this attachment was wholly ineffectual, because the orators were not in a situation to assert any debt against her husband,—the goods which made up their account not having been sold to him nor on his credit. The debt due to them rested on a sale made to his wife, and a credit exclusively given to her. So far as this case depends upon the orators' rights against him and his wife, there can be no doubt whatever that the stock and assets of her business should be held applicable to the payment of the debts of that business. He knew that his wife began this business without capital, and must have known that she was procuring goods on credit. For the debt due to the orators

they have no remedy against either him or her at law; and, by his acquiescence and consent, they have been placed in a situation in which they can enforce no claim for the debt due to them except against the stock and proceeds of the business. He allowed this course of dealing; and this is sufficient to prevent him from holding the property against the claims of the creditors of the business. Even if he was liable at law for the debts of the business, a court of equity would relieve him, at least, to the extent of making the funds in the trade applicable to the payment of the debts. 2 Story's Eq. Jurisp., (Redfield's Ed.), § 1397, note 3. In Richardson, Adm'r, "v. Es-¹¹⁵tate of Merrill et al., 32 Vt. 27, the right of the wife to her separate property, whether acquired before or during cov-
er-
ture, and, in the latter case, whether the acquisition is the result of gift or inheritance, or is the product of her own personal earnings, is distinctly recognized; and Redfield, Ch. J., in delivering the opinion of the court, says that "in every such case, she will hold against the husband and his heirs, and generally against his creditors, so long as the husband allows the wife to keep the property sepa-
rate from the general mass of his own es-
tate, although his own name may be used in the formal conduct of the business, unless in the case of creditors this may lead to a false credit on the part of the husband." It appears from the testimony that Mrs. Howard, very soon after the commencement of her sickness, indicated her desire and intention to charge the property belonging to the millinery shop with the payment of the debt due to the orators, and no question is made upon the testimony in respect to this fact. Although she could not bind herself by a personal contract, yet she may conclusively bind her separate property for the payment of her debts, and a court of equity will hold her separate property lia-
ble for her debts. 1 Spence Eq. Juris.
595-598; Taylor v. Shelton, 30 Conn. 122;
Yale v. Dederer, 18 New York 265,—S. C.,
22 New York 450; Owens v. Dickenson,
Craig and Ph. 48; 2 Story's Eq. Jurisp.,
(Redfield's Ed.), § 1397, note 2, § 1401a.

The goods and other property in the millinery shop were on the 9th of February, 1860, and within a very few minutes previous to the attachment of the same on the writ of the orators against the defendant Ralph Howard as above stated, delivered by him into the possession of the defendant Wardner to be held as security for his indebtedness to said Wardner upon book account, notes, and otherwise. This indebtedness appears to have commenced, and wholly to have accrued, after January, 1855, and no inconsiderable part of it accrued before Mrs. Howard commenced the millinery business. Its total amount on the 9th of February, 1860, was \$436.09. The defendant Wardner can stand in no more favorable position against the
¹¹⁶ claim of the orators than that occupied by Mr. Howard, unless he is to be treated as being justified in giving credit to him in reliance on the stock of the millinery shop. During the greater

part of the time in which Mrs. Howard carried on this business, her shop or place of business was in the immediate vicinity of the store of the defendant Wardner; and he admits in his testimony that she superintended the millinery business mostly, so far as he observed it. The occasional acts of her husband in superintending and managing the business in her absence are not sufficient to raise a doubt that, when she was at home, the business was exclusively managed and conducted by her, as much as if she had been a *feme sole*. The defendant Wardner must have known that she had no capital, and the manner in which the business was con-
ducted was such as to put him on inquiry before advancing property on the credit of the goods. If he had made such inquiry, he would have discovered that the goods which came to the shop were in packages marked with her name,—that the entire business of the shop was conducted and managed by her,—that the other mer-
chants in the same village kept accounts with her separate from the accounts kept with her husband,—and that her husband had nothing to do in supplying her shop with goods, or in carrying on its business. Mr. Wardner must be taken to be affected with notice of the manner in which the business of the millinery shop was in fact carried on, because his situation and opportunities for observation were such as to justify the belief that he must have known all about it. We think that, having notice of the manner in which the business of the shop was conducted, he was not justified in giving credit to her husband on account of the stock and property of that shop, and that he has no right to a lien upon that stock and property, derived from the assignment to him by her husband, which can be considered effectual against her creditors who supplied goods to the shop. His claim to such a lien, if valid at all, must be treated as limited to the ultimate profits of the business after the payment of its debts. The asserted equity of the husband to the goods on the ground that she had been supported
¹¹⁷ by him while "she was carrying on the business, and that by his personal assistance and otherwise he had contributed to the carrying on of the business, is not, in our judgment, entitled to stand against the right of her creditors. It would have been his duty to have supported her, without any reference to the millinery business which she carried on; and that business does not appear to have been a charge upon his credit or capital to any appreciable extent. The business seems to have been remunerative and profitable while managed by his wife, and we are unable to resist the conviction that he derived benefits from it more than sufficient to satisfy him for all of the contributions in time, expenses, and property which he gave to it. The defendant Wardner stands in the position of an assignee for the security of a pre-existing debt, with notice of the real character of the business of the millinery shop and of the manner in which its stock and property had been acquired. He must be treated as holding the property subject to the equities which

would attach to it in the hands of Mr. Howard, his assignor; or as between his assignor and the orators.

On equity principles, therefore, the stock and property in the millinery shop must be treated as the separate property of Mrs. Howard. It resulted from her credit and her earnings, under the sanction and permission of her husband, and should be held liable for her debts, and subject to the demands affecting it. The facts which we regard as established by the testimony in the case are in substance alleged in the orators' bill as the ground of their equity and right to relief. On these facts, the orators are to be regarded in equity as her creditors, and we think that they have a right to have her separate property applied in payment of their debts against her. Their right as creditors to this application of the stock and property in the shop is not limited to the goods which they furnished, but extends to all the goods in the shop which were acquired upon her credit and by her earnings, be-

cause the entire stock and property was her separate property, and she clearly indicated an intention to charge the whole property with the payment of the debt due to the orators. We are ^{*118} called on to adjust any question of priority between her creditors in the application of her assets to the payment of her debts, because the orators are the only creditors of hers who are before the court.

The decree of the chancellor, *pro forma* dismissing the orators' bill, is reversed, and the cause is to be remanded to the court of chancery with directions to enter a decree in favor of the orators, providing for the application of the stock and property of the millinery shop, or of the proceeds of the same, as the separate property of Mrs. Howard, in satisfaction of the orators' debt against her, and for the taking of such accounts as may for this purpose become necessary, and allowing to the orators, as against the defendants Wardner and Ralph Howard, their costs in the court of chancery and in this court.

MARTIN v. DWELLY et al.¹

(6 Wend. 9.)

Court for the Correction of Errors of New York. Dec., 1830.

J. Crary, for appellant. S. Stevens and D. Russell, for respondents.

SUTHERLAND, J. The general question presented by this case is, whether a deed of a feme covert, not executed and acknowledged according to the provisions of the statute (1 R. L. 369), and therefore void and inoperative at law, is to be considered and treated in a court of equity as a valid agreement to convey, the specific performance of which will be decreed as against the feme covert or her heirs.

By the common law a feme covert could not by uniting with her husband in any deed or conveyance, bar herself or her heirs of any estate of which she was seized in her own right, or of her right of dower in the real estate of her husband. This disability is supposed to be founded in the principle that the separate legal existence of the wife is suspended during the marriage, and is strengthened by the consideration that from the nature of the connection, there is danger that the influence of the husband may be improperly exerted, for the purpose of forcing the wife to part with her rights in his favor. The law therefore considers any such deed or conveyance as the act of the husband only, although the wife may have united in it, and restrained its operation to the husband's interest in the premises, and gives to it the same effect as though he alone had executed the conveyance.

The only mode in which a feme covert could at common law convey her real estate, was by uniting with her husband in levying a fine. This is a solemn proceeding of record, in the face of the court, and the judges are supposed to watch over and protect the rights of the wife, and to ascertain by a private examination that her participation in the act is voluntary and unconstrained. This is the principle upon which the efficacy of a fine is put by most of the authorities. 8 Cruise, Dig. 153, tit. 35, c. 10; 2 Inst. 515; 1 Vent. 121a. But whatever may be the foundation of the doctrine, it is now fully established.

Our statute declares that no estate of a feme covert residing in this state shall pass by her deed, without a previous acknowledgment made by her before a proper officer apart from her husband, that she executed such deed freely without fear or compulsion of her husband. 1 R. L. 369. This provision, it will be observed, is an enlargement and not a restraint of the common law powers of a feme covert. It authorizes a less formal

mode of conveyance than was known to the common law. It gives to her deed, when duly acknowledged, the same power and effect as a fine; but if not acknowledged according to the directions of the statute, it declares that no estate shall pass by it. It leaves it as it would have stood at the common law, if the statute had never been passed, absolutely void and inoperative.

It was conceded that such must be the consequence at law; but it was contended that a court of equity would consider it as an agreement to convey, and if it was shown to have been voluntarily made for a valuable consideration, would compel the wife or her heirs specifically to perform it. This doctrine appears to me to be unsound in principle and unsupported by any color of authority. A feme covert, by the principles of the common law, is not only incapable of conveying her real estate by deed, but she cannot, as a general rule make a valid contract of any description in relation either to real or personal property. This disability results from the nature of the matrimonial connection. In contemplation of law, the wife is hardly considered as having a separate legal existence. She and her husband constitute but one person. She cannot bind either her husband or herself by any contract. She may execute a naked power, and as to her separate estate, that is, such estate, either real or personal, as is settled on her for her separate use, without any control over it on the part of her husband, a court of chancery for certain purposes will consider her a feme sole, and her contracts in relation to it may be binding (5 Day, 496; 2 Kent, Comm. 137-141; 1 Johns. Cas. 450; 3 Johns. 77; 17 Johns. 548); but her own lands, or her right of dower in the lands of her husband are not her separate estate, within the meaning of this rule. It certainly will not be contended that the conveyance in this case can have any greater effect than an express covenant on the part of the husband and wife to convey; and I apprehend that an examination of the cases will show that such a covenant made during coverture would be absolutely void against the wife and her heirs, both at law and in equity. The greatest extent to which the English courts have ever gone, is to hold that an action would lie against a wife after the death of her husband, upon a covenant of warranty contained in a fine, executed by her and her husband, though she was a feme covert when it was levied. This was held in the case of Wotton v. Hele, 2 Saund. 178, and 1 Mod. 290. It was also held in some of the earlier cases, that if baron and feme joined in a lease for years by indenture of the wife's land, and she accepted rent after his death, she was liable to the covenants in the lease. Greenwood v. Tyber, Cro. Jac. 563, 564; 2 Saund. 180, note 9. The acceptance of the rent is a confirmation of the lease, and may be considered equivalent to a new execution

¹ Irrelevant parts omitted.

and delivery, though the wife was at liberty, after her husband's death, to avoid or affirm it if she had chosen.

The doctrine that a wife is bound by her covenant of warranty, entered into during coverture, is considered by Chancellor Kent (2 Kent, Comm. 140) as at war with the established principle of the common law; that she is incapable of binding herself by any contract; and a contrary doctrine has been expressly held, both in this state and in Massachusetts (Fowler v. Shearer, 7 Mass. 21; Colcord v. Swan, 7 Mass. 291). In these cases it was observed, that although the deed of a married woman is *ipso facto* void by the common law of England, yet by the immemorial usage of Massachusetts it would pass her estate, and she would be estopped by her covenants, though no action would lie against her for a breach of them. But the supreme court of this state, in Jackson v. Vanderheyden, 17 Johns. 167, went still further, and held that a feme covert not only was not liable to an action on the covenants contained in a deed executed and acknowledged according to the statute, by her and her husband, but that she was not estopped by her covenant from setting up any outstanding title to the premises, or any other defence. Chief Justice Spencer, in delivering the opinion of the court, observed, that it was a settled principle of the common law, that coverture disqualifies a feme covert from entering into a contract or covenant personally binding upon her. She may at common law pass her real property by a fine duly levied; and under our own statute, she may also in conjunction with her husband, on due examination before a competent officer, convey her real estate; but such deed cannot operate as an estoppel to her subsequently acquired interest in the same land.

There is a class of cases in which, where the husband had expressly covenanted that his wife should join in a fine of her real estate, he has been decreed specifically to perform his covenant, or to suffer imprisonment by way of penalty. Griffin v. Taylor, Toth. 106; Barrington v. Horn, 2 Eq. Cas. Abr. 17, pl. 7; Hall v. Hardy, 3 P. Wms. 187; Morris v. Stephenson, 7 Ves. 474; Withers v. Pinchard, cited in Morris v. Stephenson. In most of those cases, however, it did not appear that the wife had refused to unite in the fine; and the only reason on which the decisions are put, is, that it is to be presumed she was consulted by her husband before he entered into the covenant, and gave her assent to it. Lord Cowper, however, questioned this doctrine in Outread v. Round, 4 Viner, Abr. 203, pl. 4, cited in 1 Fonbl. 293, note 7, as did the master of the rolls in Daniels v. Adams, Ambl. 495. Its soundness was also denied by Chief Baron Gilbert, in his Lex Praetoria, 245, and most pointedly by Lord Eldon, in Emery v. Wade, 8 Ves. 514, and in Martin Mitchell, 2 Jac. & W. 425. It was conceded

by the counsel and by Sir Thomas Plumer, the master of the rolls, that such was not the law at this day. The same opinion had been previously expressed by the same learned judge, in Howell v. George, 1 Madd. Ch. 16.

The case of Baker v. Childs, 2 Vern. 61, is the only one which I have been able to find which contains the slightest intimation that a feme will be decreed specifically to execute an agreement made by her during coverture. The whole report of that case is this: "Where a feme covert, by agreement made with her husband, is to surrender or levy a fine, though the husband die before it be done, the court will by decree compel the woman to perform the agreement." No facts or circumstances are stated. Whether it was an ante-nuptial agreement between the husband and wife, or an agreement made by them with some third person, it is difficult to discover. It is altogether too loose and bald a case to be entitled to any consideration; and it is said of that case, in 1 Eq. Cas. Abr. 62, pl. 2, that upon looking into the register's minutes, it appeared that the court made no decree in it; but it was, by consent referred to Mr. Serjt. Rawlinson for his arbitration. It is in no point of view, therefore, an authority. The case of Roupe v. Atkinson, Bumb. 163, cited by the counsel for the appellants, was this: A lease for a term of years was assigned to the trustees before marriage, in trust that they should make leases for the benefit of the husband and wife. After marriage, the husband and wife assigned the lease to one Sparke for a valuable consideration. After the death of the husband, the widow brought her bill against Sparke, to be levied against this assignment made during coverture, on the ground that no fine had been levied. It was held that the assignment by the cestuis que trust was in the nature of an appointment, and should bind him in equity as much as if it had been made by the trustees by their direction. It bears no analogy to this case. The anonymous case in Moseley, 248, is equally inapplicable. An estate was purchased in trust for the husband and wife and their heirs, and the husband and wife joined in a mortgage to the vendor to secure a part of the purchase money. The mortgagee brought a bill of foreclosure, and the husband and wife put in a joint answer, in which it is to be inferred no objection was taken to the mortgage on account of the coverture of the wife. The husband died pending the suit, and the wife then moved for leave to amend her answer, in order to set up the defence that no fine had been levied. The lord chancellor refused the motion, with the single observation, that though the mortgage was insufficient at law, he should consider the answer that had been put in as equal to a fine. Penne v. Peacock, Cas. t. Talb. 41, was a case of a mortgage given by the husband to the plaintiff upon the

lands of his wife, which had been conveyed by her to trustees, with his privity, before the marriage, in trust to pay the rents and profits to her separate use for her life. After the mortgage given, the husband and wife levied a fine of the mortgaged premises, and both declared the uses of the fine to be to the plaintiff, for securing the principal and interest of the mortgage. The wife insisted in her answer that she had joined in the fine by duress of her husband, and that she had no estate in the premises upon which a fine could operate. The suggestions of duress and fraud were not sustained by the proofs, and it was held as an established doctrine, that the operation of a fine is the same upon trust as upon legal estates. That case also is entirely inapplicable to this.

The precise question, however, involved in this case has arisen in a sister state, and been very ably discussed both by the counsel and the court. I allude to the case of *Butler v. Buckingham*, 5 Conn. 492. It was there held that an agreement by a feme covert, with the assent of her husband, for the sale of her real estate, was absolutely void at law, and could not be enforced against her in a court of equity. The defendant in that case, Mrs. Buckingham, as the widow of her former husband Joseph Bryan, had a right of dower in a particular lot of land of which he died seized. She subsequently married Gideon Buckingham, and she and her husband, in January, 1793, agreed to sell all her interest in the premises to the plaintiffs Butler and Atwater, and joined in a penal bond to them; the condition of which was, that if she should quit-claim all her right of dower in the premises to the obligees, then the bond should be void. The petition (which was in the nature of a bill in chancery) stated that the petitioners immediately entered into the possession of said land, and from that time to the date of the petition, a period of more than 20 years, had had peaceable and uninterrupted possession of the same; that they had made valuable improvements thereon, with the knowledge of the defendant and her husband, in full confidence that they would perform their agreement; that Gideon Buckingham, the husband of the defendant, died in 1810; and that she, upon regular and repeated applications, had refused to quit-claim her right of dower, and had recently commenced an action at law to recover the same from the plaintiffs. The petition prayed for a perpetual injunction, or that the defendant should be decreed to convey her right of dower in the premises. Upon a demurrer to this petition, it was held by the nine judges sitting as a court of errors, that the petitioners were entitled to no relief. It was observed by the court that the whole system of the common law was opposed to the doctrine on which the petition was founded; that it was a fundamental principle of the common law that the contract of a feme covert is absolutely void,

except where she conveys her estate by fine duly acknowledged, or by some matter of record, when she is privately examined in order to ascertain whether such conveyance is voluntary on her part; and it is pertinently said, How absurd then would it be to enforce such a contract to convey, made without such examination? It would be saying that a feme covert cannot directly convey her real estate, unless she be privately examined; and yet she can contract to convey without such examination, and such contract will be enforced against her. By this mode, the established law in relation to a feme covert and her real estate will be completely subverted.

A feme covert, in relation to her separate property, that is, property settled to her separate use by deed or will, with a power of appointment, and rendered subject to her exclusive control, and also with respect to property which she holds as trustee without any beneficial interest in her own right, is considered as a feme sole, and her contracts in relation to those subjects may be valid, and a court of equity may interfere to enforce them. As to all other matters, they are absolutely void, and it is no less a moral than a legal absurdity, to say that a court of equity will enforce a void contract; it is a mere nullity; there is nothing to be carried into execution. The deed of a feme covert, not acknowledged according to the statute, forms no consideration for a promise to pay the purchase money; a note given under such circumstances is a nudum pactum and void as between the parties. This was expressly adjudged by the supreme court of Massachusetts, in *Fowler v. Shearer*, 7 Mass. 14, and must be so upon every principle applicable to contracts. If an absolute sale consummated by a deed is void, unless such deed is acknowledged in the mode prescribed by the statute, it is impossible that a contract to sell and convey at some future time should be valid.

The language of the master of the rolls, Sir Thomas Plumer, in *Martin v. Mitchell*, 2 Jac. & W. 424, upon the general principle applicable to the contracts of married women, is very strong and explicit. He says: "The acts of a married woman with respect to her estate are perfectly void. She has no disposing power, though she may have a disposing mind. An agreement signed by her with her husband cannot affect her estate, and cannot give the party a right to call upon her in a court of equity to execute a conveyance, to bar her if she survives, and to bind her inheritance. If an agreement is signed by a person competent to contract, and is for a valuable consideration, but defective in form, there is a remedy in equity; for you have a valid contract to stand upon. But with a married woman there can be no binding contract. The instrument is not good as an agreement; then how can it be said to bind her?" The same language substantially is used by the court in the case of *Wright v.*

Buller, 2 Ves. Jr. 676, and is to be found in all the elementary treatises upon the subject. The cases of Jackson v. Stevens, 16 Johns. 114; Jackson v. Cairns, 20 Johns. 303; and Doe ex dem. Depeyster v. Howland, 8 Cow. 277,—show very conclusively the opinion which has always been entertained in our courts of the absolute nullity of a conveyance or contract made by a married woman in relation to her real estate. In the first case Judge Spencer observed, that the conveyance, although signed and sealed by the wife, was not her deed until she had acknowledged it according to the statute. It could not bind her as a contract. She was not confirming an inchoate and imperfect agreement. The

deed took its efficacy from the period of her acknowledgment. There was nothing prior, to which it could relate. The other cases are equally strong to the same point. Vide, also, 7 Johns. 81. The bill is not framed with a view to the refunding of the purchase money paid by the appellant for the premises in question. It seeks distinctly a specific execution of the agreement, or a perpetual injunction of any suit at law. Whether the representatives of Abner Dwelly could be compelled to refund, it is not now necessary to consider.

I am in favor of affirming the decree, with costs.

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BERGH v. WARNER.

(50 N. W. 77, 47 Minn. 250.)

Supreme Court of Minnesota. Oct. 21, 1891.

Appeal from municipal court of St. Paul; Cory, Judge.

Action by Christian C. Bergh against Lucien Warner for debts contracted by defendant's wife. Plaintiff appeals. Order affirmed in part and reversed in part.

Lewis El Jones, for appellant. William G. White, for respondent.

MICHELL, J. It is sought in this action to hold the defendant liable for debts contracted by his wife during coverture and cohabitation. The first cause of action is for the price of a pair of diamond earrings, purchased by the wife for her own use; the second is for a small sum for repairing certain articles of her jewelry. The wife has, by virtue of the marriage relation alone, no authority to bind her husband by contracts of a general nature. She may, however, be his agent, and, as such, bind him. This agency is frequently spoken of as being of two kinds—First, that which the law creates as the result of the marriage relation, by virtue of which the wife is authorized to pledge the husband's credit for the purpose of obtaining those necessaries which the husband himself has neglected or refused to furnish; second, that which arises from the authority of the husband, expressly or impliedly conferred, as in other cases. The first of these, sometimes called an "agency in law," or an "agency of necessity," is not, accurately speaking, referable to the law of agency; for the liability of the husband in such cases is not at all dependent upon any authority conferred by him. He would, under such circumstances, be liable although the necessaries were furnished to the wife against his express orders. The real foundation of the husband's liability in such cases is the clear legal duty of every husband to support his wife, and supply her with necessaries suitable to her situation and his own circumstances and condition in life. But the wife's authority on this ground to contract debts on the credit of her husband is limited in its extent and nature to the legal requirements fixed for its creation, of the existence of which those persons who assume to deal with the wife must take notice at their peril. If they attempt to hold the husband liable on this ground, the burden of proof is upon them to show—First, that the husband refused or neglected to provide a suitable support for his wife; and, second, that the articles furnished were necessaries. The term "necessaries," in its legal sense, as applied to a wife, is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility, or even ornament, as are suitable to maintain

the wife according to the estate and rank of her husband.

In regard to the much vexed question as to how it is to be determined, in a given case, whether the articles furnished were necessaries, the general rule adopted is that laid down by Chief Justice Shaw in *Davis v. Caldwell*, 12 Cush. 512, viz., that it is a question of fact for the jury, unless in a very clear case, where the court would be justified in directing authoritatively that the articles cannot be necessaries. In this case the plaintiff utterly failed to establish a right to recover for the articles sued for in the first cause of action as "necessaries." Conceding, for the sake of argument, that, in view of the estate and rank of the defendant, the trial judge would have been justified in finding as a fact that diamond ear-rings were necessities; yet, so far from there being any evidence that the defendant neglected or refused to provide his wife a suitable support, it affirmatively appeared that he provided for her amply, and even liberally.

The only other ground upon which the defendant could be held liable was by proof that he expressly or impliedly authorized his wife to purchase the articles on his credit. This is purely and simply a question of agency, which rests upon the same considerations which control the creation and existence of the relation of principal and agent between other persons. The ordinary rules as to actual and ostensible agency must be applied. The agency of the wife, if it exists, must be by virtue of the authorization of the husband, and this may, as in other cases, be express or implied. Her authority, however, when implied, is to be implied from acts and conduct, and not from her position as wife alone. Of course, the husband, as well as every principal, is concluded from denying that the agent had such authority as he was held out by his principal to have, in such a manner as to raise a belief in such authority, acted on in making the contract sought to be enforced. Such liability is not founded on any rights peculiar to the conjugal relation, but on other grounds of universal application. By having, without objection, permitted his wife to contract other bills of a similar nature on his credit, or by payment of such bills previously incurred, and thus implying recognizing her authority to contract them, a husband may have clothed his wife with an ostensible agency and apparent authority to contract the bill sued on, so as to render him liable, although she had no actual authority, just as any principal would be liable under like circumstances. It is also true that where the wife is living with her husband, she, as the head and manager of his household, is presumed to have authority from him to order on his credit such goods or services as, in the ordinary arrangement of her husband's household, are required for family use. *Flynn v. Messenger*, 28 Minn.

208, 9 N. W. 759; Wagner v. Nagel, 83 Minn. 348, 23 N. W. 308. This presumption is founded upon the well-known fact that, in modern society, almost universally, the wife, as the manager of the household, is clothed with authority thus to pledge her husband's credit for articles of ordinary household use. But the articles sued for here are not of that character, and no such presumption would arise from the mere fact that the parties were living together as husband and wife. To hold the husband liable there must have been some affirmative proof of authority from him, either express or implied from his acts and conduct. In this case there is an entire absence of any evidence of express authority. Indeed, the evidence tends quite strongly to show that it was his expressed wish that his wife would incur no bills, and that his monthly allowance to her of "pin-money" was intended to avoid any occasion for her doing so. The evidence of acts and conduct on part of defendant tending to show that he had clothed his wife with apparent or ostensible authority to buy any such articles on his credit was exceedingly slight. The mere fact that he furnished his wife with expensive wearing apparel had little, if any, tendency to prove any such fact. The same may be said of the evidence that on one occasion he paid a dress-maker's bill of \$186, contracted by his wife, especially as there is no evidence that plaintiff had any knowledge of that fact. As to previous dealings between the parties, the only evidence is that on various occasions plaintiff had sold the wife articles of jewelry for cash, but on

one occasion, nearly three years before, he had sold her on credit a bill of jewelry amounting to some \$19, the principal item of which was a pair of opera-glasses of the value of \$12, and that this bill was charged on plaintiff's books to the wife, but that the husband, about a year afterwards, paid it. We do not think that the evidence was such as to require a finding that the wife had authority to purchase the articles on the credit of the defendant.

The other assignments of error, affecting the first cause of action, are not of sufficient importance to require further mention than to say that we think they are without merit.

Upon the trial the defendant's counsel stated in open court that "defendant admits the items in the bill for repairs, [the second cause of action,] but disclaims any liability for the diamond ear-rings." This must be construed as an admission of the second cause of action. The trial court found against plaintiff on both causes of action. This was, of course, error. Doubtless, it was an oversight, which resulted from the court not having in mind the admission made on the trial. The mistake was one which doubtless would have been prevented or corrected without the necessity of an appeal to this court, merely by plaintiff's counsel calling the court's attention to the matter. Under these circumstances, the amount being only \$6.50, we do not think the appellant ought to recover statutory costs. The order appealed from is affirmed as to the first cause of action, and reversed as to the second, but without costs to either party.

COLE v. SHURTLEFF et al.
 (41 Vt. 811.)

Supreme Court of Vermont. Caledonia. Aug.
 Term, 1868.

Book account. Heard on the report of the auditor, at the June term, 1867. STEELE, J., presiding. The court decided that items 1, 2 and 8 of the defendant's account should be disallowed, and rendered judgment for the plaintiff, on the report, for the sum of \$40.56 and interest from January 1, 1864; to which the defendant excepted. Item 1 was a silk dress; item 2, a sack; item 8, a shawl. The auditor reported the following facts in respect to these items: "It appears that the plaintiff married a daughter of the defendant April 14, 1864. In December, 1863, the plaintiff enlisted and went into the army. He sent Lizzie Shurtleff (afterward his wife) about that time \$75; and also sent her an order on the town for \$800, his bounty. This \$800 Lizzie Shurtleff (not then his wife) deposited in her own name in the savings-bank. *A portion of this *812 money remained in the savings-bank till after her death, and all the while subject to her disposal. The least amount there at any time, was \$100. About a year before her marriage, a dress, sack and shawl were bought for her by her father, as he says, with the understanding that she should pay for them. The evidence of the father is the only evidence to show that she was intended to be charged for them, and did not regard them in the light of a gift. If the court decide that this evidence of the father is admissible, she being dead, then your auditor finds that Lizzie was legally chargeable for items 1, 2 and 8. If the court decide that, she being liable, Cole's having promised to pay for them after marriage, would render him liable, your auditor allows these items (dress, sack and shawl). This suit was not brought, till after the death of the wife, and Cole's promise was not in writing. Your auditor further finds that Cole had promised to pay for the dress, sack and shawl, before he was married, and agreed that they might offset against what the defendant Shurtleff owed him for work."

Jonathan Ross, for plaintiff. Bliss N. Davis, for defendant.

PROUT, J. In this case the county court decided that, upon the facts reported, the defendant was not entitled to recover the amount of the disputed items, they being for articles of clothing purchased and furnished by the defendant to the plaintiff's deceased wife about a year before their marriage. The defendant was her father, and he testified before the auditor, that the articles in question were bought for her by him, with the understanding that she should pay for them. She died prior to *314 the commencement of the action, but the report shows that, both before and after her marriage to the plaintiff, he promised the defendant to pay for them, as disclosed by the report.

I As to the admissibility of the defendant as a witness. The objection to him as a witness, proceeds upon the ground that, the plaintiff's wife being a party to the contract existing between her and her father, the defendant, and the being dead, the defendant was not an admissible witness. Gen. Sta., ch. 86, § 24.

It is true the agreement between the defendant and the plaintiff's wife, found by the auditor, by which she was under obligation to pay the defendant, was material, but the issue in

the action and on trial was not upon that agreement. That was whether or not the plaintiff undertook, and promised the defendant, to pay him for the articles of clothing in controversy. Without such promise or undertaking no liability whatever, upon the facts, was resting upon the plaintiff, by which he was under a legal obligation to pay the defendant his claim. The contract of Mrs. Cole, the defendant's daughter, with her father, the defendant, was, then, simply a fact bearing upon the plaintiff's liability and the defendant's right of recovery, but collateral to the plaintiff's contract or promise, upon which the defendant's right of recovery necessarily depended. If this is so, the contract of the plaintiff's wife was in question before the auditor only as every collateral or incidental fact is which may have a bearing upon the ultimate question to be determined in the cause, but which does not directly involve the party's liability, or right of recovery. As the promise relied upon by the defendant, was made as between these parties to the action and neither being dead, the disqualification contemplated by the statute, does not apply. Manufacturers' Bank v. Scofield, 89 Vt., 590; Baxter v. Knowles, 12 Allen, 119.

The design of the statute was to exclude a party from testifying when the other party to the contract in issue and on trial has died, and when in the action such deceased party is represented by an executor or administrator, and contemplates a suit or proceeding, the determination of which may affect the estate of the deceased party. In this case, nothing of that kind is attempted or can result from the proceeding, whatever may be the determination of the suit. Should the defendant recover against the plaintiff and to the extent of his claim, the estate of the plaintiff's wife, if she left any, remains untouched, and creditors, heirs, legatees or representatives, as such, from the nature of the claim, can suffer no harm. The case itself is, therefore, one to which the reason and spirit of the statute have no application. Upon these views, the defendant was an admissible witness.

II. The plaintiff's promise made before his marriage to the defendant's daughter, was a naked promise to pay her debt. She not being discharged or released from its payment, and it resting entirely in parol, it was collateral and can not be enforced. Anderson v. Davis, 9 Vt., 186; Fullam v. Adams, 87 Vt., 891. And then, again, the promise was, as the report shows, a mere agreement that the defendant's claim might offset as against the claim of the plaintiff: "the plaintiff agreed it might." It does not appear that the defendant assented to this proposed application; but assuming he did, it not having been done, the case in all aspects, so far as this question is concerned, is within the statute of frauds. Brand v. Brand, 49 Barb., 846.

III. As to the plaintiff's promise to pay after his marriage. The report shows that the plaintiff promised to pay for these articles "after his marriage," and it is insisted that, by the marriage, the debt of the wife became the debt of the husband, and that he is under a fixed and absolute obligation to pay it.

As to this antenuptial debt of the wife, the plaintiff, as a legal consequence of his marriage, became liable to pay it; but this was a joint liability with the wife. She could not have been sued alone, neither could the husband. It is an elementary rule, that when a *feme sole* who has contracted a debt, marries, the husband and wife must, in general, be jointly sued in an action brought for its recovery, even though the husband has expressly promised to pay it. Chitty's Pl. (18th Am. ed.), 57. This liability

of the husband, arising and existing as a consequence of the marriage, and which can be enforced only in a joint action against both, is of a temporary or qualified nature. It terminates on the death of the wife, unless enforced during coverture by the recovery of a judgment, and his liability in this respect is of the same qualified character incident *816 to his rights, as husband, to her choses in action. Unless he reduce them to possession during coverture, and with the intent to make them his own, they are not his absolute property, but they belong to her representatives. Reeve's Dom. Rel., 58, 148; Buckner v. Smyth et al., 4 Des., 871; Heard et ux. v. Stamford, 8 P. Wms., 410; Howes, executrix, v. Bigelow, 18 Mass., 884; Wilson et al. v. Bates, admir., 28 Vt., 765; Barber v. Slade et al., 80 Vt., 191; Mitchinson v. Hewson, 7 Term R. 848.

These principles proceed upon the obvious ground that the debt sought to be recovered in the one case, and the property or choses in action in the other, are the wife's. It is for this reason, and because the debt is hers, that the husband, in an action brought for its recovery, must be joined, which would not be the case, as Reeve, J., says, if the husband were to be considered the debtor. If, by virtue of the marriage, "the debt had been transferred to the husband, it would not survive against the wife; but it does survive against her; and this is perfectly consistent with the idea that she is considered by the law as the debtor." Reeve's Dom. Rel., 58, 54; 2 Kent's Com., 145. Upon this view, it would seem that the promise relied upon, referring to, and applicable only to, the debt of another, and not being supported by any consideration, nor in writing, was invalid as within the statute of frauds. But however that may be, the question stands upon clear reasons upon another ground. The de-

fendant's right of recovery for these articles depends upon the naked fact that the debt was contracted by the plaintiff's wife *dum sola*, and that, subsequent to the marriage and during coverture, the plaintiff promised to pay it. The fact that the plaintiff was once liable to pay the claim, in another right, so to express it, and in consequence of the legal liability resting upon him as the husband of the defendant's deceased daughter, gives the promise no additional efficacy or legal force, and can make no difference in the determination of the question. It was nevertheless a promise not made upon any consideration. When made, the plaintiff was liable for the debt, but liable as husband; and if, as remarked by COLLAMER, J., in Russell v. Buck, 11 Vt., 186, the consideration *817 "of the plaintiff's promise was his existing liability, and in consideration thereof he promised to pay the defendant's claim, it created no new legal liability, but left 'the debt and the parties as they were before.' Such a promise might indeed affect the claim as to the statute of limitations, but would be no ground of action in itself." It was not founded upon anything beneficial to the plaintiff or prejudicial to the defendant. And in Rann et al., executors, v. Hughes, admx., reported at length in a note in 7 Term Reports, 346, it is said and held that, "if I promise generally to pay upon request what I was liable to pay on request in another right, I derive no advantage or convenience from this, and therefore there is not a sufficient consideration for" the promise. The promise relied upon, therefore, being insufficient as giving a legal ground of recovery, and the defendant not having perfected his right as against the plaintiff in respect to his claim during coverture, he is not entitled to be allowed the amount of the items in dispute.

The judgment of the county court is affirmed.

DALE v. ROBINSON et al.

(51 Vt. 20.)

Supreme Court of Vermont. Washington. Aug.
Term, 1878.

Appeal from chancery court, Washington county.

The bill alleged that on and before January 1, 1867, and from that time to the bringing of the bill, the defendant Mary A. Robinson was the wife of the defendant Isaac D. Robinson, and lived with him as such; that during all that time she was the owner of certain property in Moretown, consisting of certain lands, dwelling houses, mills and mill-yards, together with the machinery, tools, lumber, and other personality in said mills and yards, all of which was her sole and separate property; that the said Mary there carried on the business of manufacturing lumber and grinding grain for herself and for customers; that during all that time said Isaac had acted therein as the agent of said Mary, with her consent and authority, and as such had bought, cut and drawn logs, bought and ground grain, and sold meal and provender in the name and for the benefit of said Mary; that at the special instance and request of said Mary, and at divers times during said period, the orator did certain work for her in and about said business, sold and delivered to her divers goods for sums agreed on, paid to her or to said Isaac in her behalf divers sums of money, and furnished pastureage for her cows, &c., for all of which the said Mary was indebted to the orator in the sum of four thousand dollars; that during all that time said Isaac was, as the orator was informed and believed, wholly without property and irresponsible, and that all of those matters and things were performed and provided on the sole credit of said Mary and her property. The bill further alleged that in 1875 one N. R. Spaulding was the owner of a certain mortgage on certain of the orator's lands, which he procured to be foreclosed; that thereupon the said Isaac as agent of said Mary and with her authority and consent agreed with the orator that the orator should do certain work on the foundation and in the erection of one of said mills, furnish logs and lumber to be sawed and manufactured therein, and work in cutting and drawing the same, whereupon the said Mary should sell and dispose of said lumber and apply the proceeds, first, in payment of a bank note of the orator's, and, secondly, in redemption of said mortgaged premises; that the orator relying on said contract performed his part thereof, but that said Mary did not perform on her part, but refused so to do; and that the orator had since that time furnished the said Mary many thousand feet of logs and lumber that she had sold for more than \$1,500, for which the orator claimed that the said Mary should account. The bill insisted that the estate of said Mary, both real and personal, should be charged with the payment of all the matters alleged, with interest and costs; and prayed for an ascertainment by the court of the sum due, for a writ of

sequestration against said Mary's separate estate, and for general relief. The answer of defendant Mary admitted her ownership of the property mentioned in the bill and the management thereof by the defendant Isaac—alleging that he was to buy logs, hire help, run the mills, sell lumber, and pay the help from the proceeds thereof, and that she supposed he had done so in her name, but denying that she had ever given him any general authority so to pledge her credit or to bind her real estate; denied that she ever made any contract of any kind with the orator, either directly or indirectly, but admitted that said Isaac had employed the orator to some extent, and bought some logs of him, but alleged that the defendant believed there was nothing due to the orator therefor, but that if there was, the orator had no lien therefor on any of said real estate or on any of the personality unconnected with the mills. The answer of defendant Isaac was in substance the same as that of defendant Mary, except that it alleged in addition that defendant Isaac never used the name of his wife in any of his contracts with the orator, and that he had paid the orator for the logs by taking up a bank note, by assisting him to raise money to pay Spaulding, and by making other payments to him. The answers were traversed and testimony taken. It appeared that the charges on the book of account exhibited by the orator, were all made to M. A. & I. D. Robinson. The defendants claimed that the book was made for the purposes of the trial, and substituted for the true original book, and took certain testimony tending to prove it. It appeared also that the property in question was conveyed to the defendant wife while

*23. *she was covert, by deed in common form, without anything therein limiting it to her sole and separate use; that the defendants had been and still were living together on the real estate as husband and wife; and that they had had children born to them. There was evidence tending to prove that the orator performed the labor and sold and delivered the property charged at the request of the wife, and on her credit and the credit of her property, under such circumstances that she knew, or in the exercise of ordinary care might have known, that the labor was so performed and the property so sold and delivered. The case was heard at the March Term, 1878, on bill, answer, and testimony, when the court, REDFIELD, Chancellor, in order that the law governing the case might first be settled, dismissed the bill, *pro forma*, with costs to the defendants. Appeal by the orator.

Heath & Carleton, for orator. J. A. & G. W. Wing, for defendants.

ROSS, J. The orator in the bill states that since January, 1867, the defendant Mary A. Robinson, then and still the wife of the defendant Isaac D. Robinson, was and still is the owner and possessor of certain personal and real property in Moretown, as her sole and separate property, which was managed and operated by her husband as her agent and for her ben-

that the real estate consisted of lands, houses, saw and grist mills, in the latter of which she manufactured lumber and ground grain for herself and others; that the orator during said time has worked for her on said mills, and sold her lumber and other property, which went for the benefit of her separate property, on her sole credit and the credit of said property; that during all said period, I. D. Robinson was destitute of property and wholly irresponsible; and claiming that her separate property should be charged with the payment of such indebtedness from her to the orator. The defendants have answered separately. They admit that she is the owner of the property specified in the bill. She admits that during the time stated in the bill I. D. Robinson has managed the property as her husband, has run the mills, bought logs and sold lumber, and she supposes the business has been done in her name. She denies that she has ever contracted with the orator personally, directly or indirectly, or that she has ever authorized her husband to pledge her credit so as to bind her real estate. He makes a similar denial. He admits that he has run the mills in her name for the support of the family. She avers he was to hire help, buy logs and sell lumber, and pay the help out of the avails of the lumber sold. Both admit that the orator has worked on the mills and furnished logs or lumber, &c., but deny any existing indebtedness to him for the same. There is no denial of the insolvency of the husband.

The orator's charges stand on his book to M. A. & I. D. Robinson. Whether the book is original, or substituted since the charges accrued, we do not consider material to the solution of the questions involved in the case, except so far as his credibility as a witness is thereby affected. The deed conveying the property to Mary

A. Robinson is in common form. It *25 contains no "limitation that it shall be held to her sole and separate use. It was made to her while covert." It does not appear whether the purchase-money was property set apart to her sole and separate use, further than it was money which the husband allowed her to have, control, and invest in the real estate as she did invest it. The defendants have been and still are living together on the property as husband and wife. They have had children born, so that on her death he would be entitled to the use of her real estate as tenant by the curtesy. From the evidence in the case, notwithstanding the denial in the answers, and the rule that a responsive answer must be overcome by more than the testimony of one witness, we are satisfied that the orator performed the labor charged at the request of the defendant wife, and that he performed the labor and sold and delivered the other property charged on the credit of the wife and of her property under such circumstances that she knew, or in the exercise of ordinary care and prudence ought to have known, that the labor was so performed, and the lumber and other property so sold and delivered.

The question presented is, whether these facts entitle the orator to the relief prayed

for. In equity the wife is treated as a *feme sole sub modo*, at least in regard to her separate property. In England the Court of Chancery has treated a married woman in regard to her separate property more nearly as a *feme sole* than have the Courts of Chancery in the United States. There, the courts have treated her general engagements, without regard to whether they have been beneficial to her or her separate estate, or contracted in its management, as a general charge upon the personal property of her separate estate and the rents and profits of her real estate. As stated by Lord THURLow in *Hulme v. Tenant*, in 1 Lead. Cas. Eq. 394, "determined cases seem to go thus far, that the general engagement of the wife shall operate upon her personal property, shall apply to the rents and profits of her real estate, and that her trustees shall be obliged to apply personal estate and rents and profits when they arise to the satisfaction of such general engagement; but this court has not used any direct process against the separate estate of the wife, and the manner of coming at the separate property of the wife has been

*26 "by decree to bind the trustees as to the personal estate in their hands, or rents and profits according to the exigencies of justice or engagement of the wife, to be carried into execution." Where there was no trustee of her separate estate appointed in the instrument creating the estate, the court has treated the husband as trustee for the purpose of enforcing her general engagements against such estate. Her separate real estate was not allowed to be taken on her general engagements, as by the laws of England real estate, with some few exceptions, could not be taken in satisfaction of debts. Since by reason of the disability of coverture she could not bind herself by promise or contract and was only treated as a *feme sole ex necessitate*, in regard to property held to her sole and separate use, the court rendered no decree binding or operative against her personally. In most cases the instruments creating the separate estate empowered her to dispose of the same by appointment in writing. The *jus disponendi* has attached where there is no limitation to the contrary imposed by the instrument creating the estate. The undisposed-of real estate settled to her separate use of which she is seized in fee, descends to her heirs subject to the right of the husband as tenant by the curtesy. See notes to *Hulme v. Tenant*, supra. The Courts of Chancery in this country generally have not followed the leading of that court in England so far as to make the wife's general engagements a charge upon her separate property.

The subject has engaged the attention of, and been very ably discussed by, many of the state courts. The results arrived at are far from harmonious. In South Carolina, Ohio, Pennsylvania, and some other states, it is held that a married woman is not for any purpose to be treated as a *feme sole* in regard to her separate estate, and that she has no power to deal with or charge the same except, and only so far, as the power is given by the instrument creating the estate; and where such power is given, it must be strictly fol-

owed, to operate as a charge upon such estate. She is not regarded as having any power over such estate by virtue of its being held to her sole and separate use, and all her dealings in regard to such estate are considered in the light of the execution of a power conferred by the instrument creating the "estate. In *27 other states the court has so far treated a married woman as a *feme sole* in regard to her separate estate that whenever a clear intention on her part to charge such estate is shown, without regard to whether the debt was contracted for her benefit or that of the estate, or as a mere surety or accommodation endorser, payment has been enforced therefrom. But the doctrine more generally adopted in this country is that announced by the court in *Yale v. Dederer*, 18 N. Y. 265, which is a leading case on the subject, and in which, on full discussion, it is held that equity recognizes a married woman's debt, and charges it upon her separate estate, not on the ground that the contracting of it is of itself an appointment or charge, but because when contracted on the credit of the separate estate, or for its benefit, or that of the woman, it is just that the estate should answer; and that when the married woman is a mere surety, equity will not enforce against her a promise which is void at law, and in such case her separate estate can only be charged by virtue of some instrument for that express purpose. Among other leading cases in this country on this subject are the following: *Willard v. Eastham*, 15 Gray, 328, in which the authorities are reviewed, and *Hoar* J., says: "Her general personal engagement will not of itself affect her separate property, and therefore where creditors do not claim under any charge or appointment made in pursuance of the instrument of settlement, they must show that the debt was contracted either for the benefit of her separate estate or for her own benefit upon the credit of the separate estate, and our conclusion is that when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate or its increase to the extent to which the power of disposal by the married woman may go. But where she is a mere surety, or makes the contract for the accommodation of another without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument make the debt a charge upon it." *Burch v. Breckinridge*, 18 B. Monr. 482, in which *SIMPSON*, J., giving *28 "the opinion of the court, after stating that a married woman cannot at common law contract as *feme sole*, nor as such sue or be sued, says: "That being the legal rule, courts of equity acting in conformity with it have held that the wife cannot bind herself personally, nor bind her separate estate by her general engagements. Courts of equity, however, as a consequence of the doctrine established by

them that a married woman may have and enjoy separate estate, enable her to deal with it, alien and encumber it when she shows an intention so to dispose of it. So far as the separate estate consists of land, it cannot be made liable by a verbal contract." *Armstrong v. Ross*, 20 N. J. Eq. 109, a leading case in that state, in which the chancellor uses the following language: "If a married woman having a separate estate contracts debts for the benefit of her separate estate, or for her own benefit on the credit of her separate estate, although she will not be held liable, or any decree made against her personally, these debts will be declared a charge upon her separate estate, and payment enforced out of it." It was also held in that case that such debts are not a lien upon such estate until made so by decree of court. In *Peake v. La Baw*, 21 N. J. Eq. 269, the bill sought to charge the wife's separate real estate held under the married woman's act of 1852, with the payment of a note made by her husband and endorsed by her for his accommodation. It was held that for the payment of such a debt she could charge her separate real estate only by a mortgage executed according to the laws of the state. The chancellor says: "The courts of this country have declared the estates of married women held under these acts to be liable for debts contracted by them for the benefit of these estates, or for their own benefit on the credit of these estates. But they go no further than this." Citations from other and more recent decisions might be multiplied *ad libitum*, but these will suffice to show the general drift and ground of the decisions in this country. In this state the cases of *Frary v. Booth*, 87 Vt. 78, and of *Partridge v. Stocker*, 86 Vt. 108, touch upon the rights of creditors against the separate estate of married women in view of the facts presented by those cases, but not with reference to the precise question presented by the case at bar. *The real estate in *29 *Frary v. Booth* was devised to the defendant, who was a married woman abandoned by and living apart from her husband. The debt was contracted by her for the support of her family and attempted to be secured by a mortgage of the farm executed by her alone. The mortgage was upheld as a valid charge upon the property, though defectively executed. The wife in *Partridge v. Stocker* had been allowed by her husband to carry on the millinery business as a *feme sole* in her own name and on her personal credit. The debt was contracted by her in making purchases for the business, and was enforced against her stock of goods, notwithstanding her husband had sold and assigned them to the defendant. In a recent case heard at the last term of the Supreme Court for Windsor County, the question of how far and when the Court of Chancery will enforce the general engagements of a married woman against her separate property was discussed, but no decision has yet been announced. In that case the court was asked to enforce a debt where she was a mere surety, against such estate.

We are therefore untrammeled by any

former decision of the court in the decision to be made in this case. From the best consideration we have been able to give to the question, and from the exhaustive review of all the leading cases on this subject both in England and in this country, in the notes to *Hulme v. Tenant*, *supra*, contained in the *Leading Cases in Equity*, we think it is the better established doctrine that a married woman is only *sub modo a feme sole* in dealing with her separate estate; that her debts contracted in its management and for its benefit, or for her benefit on the credit of such estate, in equity, will be enforced against such estate, whether the same consists of personal or real estate, unless the instrument creating such estate protects it against being charged with such debts; but that her general engagements not thus connected with and growing out of her separate estate, being void at law, will not, in equity, be enforced against such estate, unless they are legally made a charge thereon, by a duly executed mortgage, if the separate estate to be charged be real estate, and by a pledge and delivery of the property pledged if the separate estate consist of personal property. The *30 *claims sought to be enforced by the orator fall within the class first named. The orator's work in erecting one of the mills on her estate went to enhance its value permanently; the lumber was bought in her name to be manufactured in her mills, and the profits, if any, legally accrued to her; the pasturing was for her cows. That she allowed the profits arising from the manufacture of the lumber and the income from the cows to be used in the support of the family, can make no difference. She had the right to give them to her husband if he were of sufficient pecuniary ability to support the family, which he was legally bound to do. If by reason of his pecuniary inability she was compelled to allow them to be so used, they were used for her benefit in that they went for her own support. It is manifest that the entire debt was contracted on the credit of her property. That the charges were made jointly to her and her husband does not defeat the orator's right to have them charged upon her property. The indebtedness charged on the wife's separate property in *Hulme v. Tenant*, was against both husband and wife, but created on the credit of the wife's separate estate.

But it is contended by the defendants that the right of disposal of the property sought to be charged is not vested in the defendant wife. If not in her, it is difficult to determine its resting place. The conveyance is in fee absolute to her. By the conveyance she is not limited in the *jus disponendi*. Her husband has no power to dispose of or in any way incumber it. His creditors cannot seize the rents, issues and products of her real property in satisfaction of their debts, nor any money due arising from its sale. Gen. Sta. c. 71, s. 18. She may devise it by will. Section 17. If he abandons her she may be allowed to sell and convey the same in her own name on application to this court. Section 1. If he ill use her, on petition to the chancellors she may be allowed to live separate and

apart from him, and enjoy her real estate for her sole use and benefit. However much he may improve her estate by his labor and management, his creditors can levy upon no part of the improved estate nor of its rents and products. *White v. Hildreth*, 32 Vt. 285; *Webster v. Hildreth*, 33 Vt. 457. It is true that by reason of the disability of coverture, he must *31 *join in the deed conveying the same.

On the disability ceasing, her power of disposal is complete. The title being in her, that conveyed during coverture must issue from her. He is made a party to the conveyance the same as he is to a suit for the conversion of or injury to her separate property by reason of the legal fiction which merges her existence in his.

In courts of equity, however, for many purposes, and especially for the protection, management, and enjoyment of her separate estate, the wife is recognized as having a separate legal existence. Its powers may be invoked in her behalf against the husband's encroachments on her rights. Hence in the forum of equity the statute requiring him to join in the conveyance of her real estate can hardly be held to be a limitation upon her *jus disponendi* of the same. The only right or interest in the wife's real estate which the statute has left in the husband, is that of residing on it with her, if she sees fit to live upon it, and of occupying the same after her decease as tenant by the curtesy; and it is doubtful if the latter attaches to such of her real estate as she disposes of by will. But if it does attach, we think it should be no bar to the enforcement of a debt against such estate on which he is jointly liable with her. It but allows the taking of his possible interest in expectancy, in satisfaction of a debt on which he is jointly liable. The statute has so far stripped the husband of any beneficial interest or right in or to the real estate of his wife, that such estates more nearly resemble estates held to her sole and separate use than any other known and well-defined estates. As we have before said, in England, the husband takes as tenant by the curtesy so much of the wife's strictly sole and separate real estate as remains undisposed of at her decease. He would also in this State. Hence the fact that this right might attach to the defendant wife's lands in favor of the defendant husband in this case, cannot defeat the right of the orator to have his debt charged upon and enforced against the estate in question, if the debt be of such a character that it could be enforced in the same manner against her strictly sole and separate estate. By the provisions of the statutes of this State real estate held to the wife's sole and separate use can only be conveyed by the joint deed of the husband and wife, and is also subject *32 to his right as tenant by the curtesy. The same is true in most of the other states in which it has been held that such estates may be charged with the payment of her debts contracted for the benefit of such estate, or for her benefit on the credit of the estate. The objection against making the orator's debt a charge upon and enforcing its payment out of the wife's real estate arises wholly from the technical

disability of her coverture. No one has any present interest in her real estate to be protected by the interposition of this disability, except herself and her husband. Being allowed by the statute and in equity to hold the title to and have the use of real estate, as an incident thereto, and *ex necessitate*, in equity, she is allowed to contract for its management and improvement on the credit of the estate, otherwise, if the husband be without credit, or if, as he may, he refuse to use his credit for that purpose, the estate might run to waste, and she be deprived of all beneficial enjoyment thereof. Hence it would be inequitable to allow her to take advantage of this technical disability to defeat the orator from recovering payment for his labor bestowed upon, and for property sold for the benefit of, her real estate, at her request and on the credit of such estate. And the husband, if he has under the statute any such interest in her real

estate as might in certain events allow him to take advantage of this disability—which is at least questionable—by consenting to and acting as her agent in the entire transaction out of which the orator's debt arose, has waived the same, and it would be inequitable to allow him now to set up and take advantage of the disability of his wife's coverture, especially when by such allowance the wife would reap almost the entire advantage to be derived therefrom.

The result is, the decree of the Court of Chancery, *pro forma*, dismissing the bill is reversed, and the cause remanded, with a mandate to that court to refer the cause to a master to ascertain the amount due the orator on the claims set forth in the bill and testimony, and to enter a decree for the orator for the payment of such sum from the separate property of the defendant wife, to be enforced by any proper process.

BOYD et al. v. WITHERS et al.
(Fed. Cas. No. 1,752.)

Circuit Court, S. D. Mississippi. 1839.

At law.

HILL, District Judge. This action of assumpsit was brought by the plaintiffs [Boyd, Coleman, and Graham] against the defendants [Withers and wife], to recover the amount stated to be due upon an account current rendered against them. The declaration alleges that the wife is possessed, as of her separate property, of a plantation, etc.; that the amount stated to be due is for advances in cash, made upon the joint bills of defendants; that the cash so received was used in the purchase of horses, mules, farming utensils, and other necessaries for the plantation of the wife, for necessaries furnished for the wife, and her children, also for their education, etc.; and seeks payment for the sums so advanced, out of the separate property of the wife. To this declaration, the defendants have demurred, and insist, as a cause of demurrer, that a married woman cannot bind herself upon a contract for the loan of money, so as to charge her separate property for payment thereof; this being the main ground of demurrer relied upon, others stated need not be considered.

By the common law, the husband became vested, on the marriage, with the title to all the personal property of the wife then in her possession, or which might be reduced to possession, during the marriage, also to the rents and profits of her real estate, her rights became merged in the husband. Such being the case, he became liable for her obligations incurred before marriage, and he alone became liable for her maintenance and support during marriage, as well as for that of her children by the marriage. Thus the legal relations remained in this state until 1839, when her rights were enlarged by statute [Laws Miss. 1839, p. 72], and again further enlarged by the act of 1846 [Laws 1846, p. 152]. The enlargement of her rights necessarily enlarged her liabilities. These rights and liabilities were further extended by Rev. Code, c. 40, § 5, art. 25, providing that "all contracts made by the husband and wife, or either of them, for supplies for the plantation of the wife, or for the maintenance, clothing, care and support of her slaves, and for the employment of an agent or overseer for their management, may be enforced and satisfaction had out of her separate estate. And all contracts made by the wife, or by the husband, with her consent, for family supplies or necessaries, wearing apparel for herself or children, or for their education, or for household furniture, or for carriage, or horses, or for buildings on her lands or premises, and the materials therefor, or for the use, benefit, or improvement of her separate estate, shall be

binding on her, and satisfaction may be had out of her separate property."

By article 26 it is provided "that the wife may be sued jointly with her husband, on all contracts or other matters for which her separate property is liable, but if the suit be against husband and wife, no judgment shall be rendered against her unless the liability of her separate property be first established." This is the first time the question now presented has come before this court, or that of the high court of errors and appeals of this state, so far as I am aware. I have, in addition to the able argument of counsel, searched for adjudications by the courts of other states, having statutes somewhat similar to our own, for something to guide me in determining the decision of this question, but have found nothing. In a case determined at the last term of this court, it was held that where supplies had been furnished the wife for the use of her plantation and family, and money was advanced for their payment, that the promise of the wife to repay the amount advanced would bind her, or, in other words, that the party making the advance was substituted to the rights of the person furnishing the supplies; but this is a case in which money was advanced before the supplies were furnished. By the common law the wife could not bind herself, or render her separate property liable, her legal existence being, during marriage, merged into that of her husband, and it is only by the statute that her rights and liabilities are enlarged, and only to the extent specified in the statute, so as to enable her to enjoy property for the benefit of herself and children, and to preserve and improve its condition. The high court of this state, in the case of Morris v. Palmer, 32 Miss. 278, determined that the wife is not bound by her contracts in carrying on a separate trade or business; and in the case of Berry v. Bland, 7 Smedes & M. 77, that the statute rendering the separate property of the wife liable to her contracts must be strictly construed.

From these and other adjudications, I am satisfied that the wife cannot, as a general borrower of money, bind herself, so as to render her separate property liable, no matter to what purpose the money may be afterwards applied; but whilst this is so, I am equally well satisfied that under the powers conferred by this provision of the Code, when it is necessary to procure money for the purposes mentioned, that she may borrow money and bind herself, and render her separate property liable; but in such case the money may be necessary for the purchase of the articles so stated, and must be so applied, and must be loaned for that purpose, upon the contract and consent of the wife, and upon her credit, the lender looking to her separate estate for payment. To hold otherwise would in many instances defeat the very object of the law. The party hav-

ing the required articles, or labor to furnish, might not be willing to do so on a credit, but another might have the money and be willing to advance it; and if done, and the supplies were furnished, or the labor performed, the party so advancing the money would be the very one who furnished the thing needed. The statute uses the words for family supplies or necessaries, wearing apparel for herself or children, or for their education. Money is often found to be a very urgent family necessity to procure supplies,—something which the family needs, and cannot well do without, for food, clothing, medicines; so money may be held to be within the very words of the act. For what purpose can a married woman desire to hold separate property, but for the use and benefit of herself and children; and after food and clothing, what is more dear to the heart of the mother than to see her children well educated? This often can only be attained by sending them from home, among strangers, where the mother has no credit. If she has not the money, how can she obtain it? Only by borrowing it from her friends; and can it be said that she cannot contract for it, and bind her separate property, which she holds in trust for this very purpose?

It will be observed, that so much of the statute as relates to the wife's plantation and slaves, the husband being the general agent of the wife, may bind her separate property by his contract for her, without the condition, that it shall be by her consent; but as to the other purposes, it requires if the contracts are made by the husband, it must be by the consent of the wife. And why? Because she might say that it was his duty, and not hers, to procure the thing needed. It is more necessary that she should consent to be bound for the borrowed money, and that it should be used for the purposes des-

ignated; otherwise a profligate, or even imprudent husband, might improperly spend it; hence the lender should be held to take the risk for the application of the funds loaned. This gives ample protection to the wife, and enables her and her children to derive the benefits intended by this provision of the law. Had the provisions of the common law remained unchanged, the estate would have been vested in the husband, who would have been bound to furnish the things needed, and the property would have been liable for the repayment of any funds necessarily borrowed for their procurement. Therefore, either regarding the person advancing the funds for the payment of the necessaries and supplies as taking the place of the one who actually furnishes them, or the money as a supply and necessity, I am satisfied, when so furnished and applied,—and its proper appropriation will be presumed in the absence of other proof,—the wife does bind herself and render her separate estate liable.

The declaration does not aver, that the money was advanced for the purposes specified, but only that it was advanced, and afterwards was so applied. This averment is not sufficient to render her liable in this action, and for this purpose the demurrrer must be sustained. The best analogy I have been able to find to the principles above stated is in the case of infants. It has been held that although an infant is bound upon his contract for necessaries, yet if one lends money to an infant, to pay for necessaries, he is not bound for the reason, that he may misapply the funds; but if the money be laid out for necessities, the lender will be permitted, in equity, to stand in the shoes of the person who furnished them, and if the lender prove that the money was applied to the payment of necessities, he will in law be entitled to a verdict.

**MALLORY'S ADM'R v. MALLORY'S
ADM'R et al.**

(17 S. W. 737, 92 Ky. 816.)

Court of Appeals of Kentucky. Dec. 3, 1891.

Appeal from circuit court, Todd county.
"To be officially reported."

Action by C. L. Mallory's administrator against A. W. Mallory's administrator and others to recover personal property. Judgment for defendants. Plaintiff appeals. Reversed.

E. W. Hines and Ben T. Perkins, Jr., for appellant. H. G. Petrie and W. B. Rives, for appellees.

BENNETT, J. A. W. Mallory, the appellee's intestate, was a widower with children, and C. L. Mallory, the appellant's intestate, was a widow with one child, a son. Both of these persons owned property, and married each other. The husband, the appellee's intestate, died, and in a few days thereafter, and before the personal property that the statute gives to the widow, and which is to be set apart to her, was set apart, C. L. Mallory, wife of A. W. Mallory, and the appellant's intestate, died. This suit was instituted by appellant's administrator to recover of the appellee, as administrator, the value of the said personal property, the same not having been set apart, and was, or some of it, on hand at the death of A. W. Mallory, but disposed of by the appellee. The contention of appellee is that, as there was an antenuptial contract between C. L. and A. W. Mallory, that entitled each to retain the title of his and her property, and dispose of the same as though no marriage had taken place, C. L. Mallory was not entitled to the property that the statute directs to be set apart to the widow upon the death of her husband. It is not alleged that the antenuptial contract was in writing; and as chapter 22, § 1, requires contracts in consideration of marriage to be in writing, if the contract relied upon comes within said provision, it was necessary to allege that the contract was in writing; and the answer, because of not alleging that fact, is not sufficient. Besides, the proof fails to show that the contract was in writing. Does the alleged contract come within said provision? It seems that the question has been settled and put beyond dispute by this court in the case of Potts v. Merritt, 14 B. Mon. 406. That case, like this, was a case of verbal and antenuptial contract, and the Revised Statutes, then in force, had the same provision, as to requiring the antenuptial contract to be in writing, as the General Statutes, supra; and this court held that the contract was

not enforceable, in law or in equity, unless it was in writing. An antenuptial contract is one by which the parties agree to anticipate the general law controlling the marital relation, and make a law in that regard to suit themselves; and consideration for the contract is the agreement to marry each other, which must be consummated, else the consideration fails. So the contract clearly comes within the provision, supra, requiring contracts in consideration of marriage to be in writing. If they are not in writing, no action can be maintained on them, and, in a case like this, such contract is no defense to an action by the widow or her representative to enforce her marital rights. It is a mistake to say that the property that chapter 31, § 11, Gen. St., directs to be set apart to the widow, only vests in the widow upon the setting the same apart to her. By said statute the right to a certain kind of property, if on hand, if not, its value, etc., vests eo instanti, by operation of law, in the widow upon the death of her husband. The setting apart of said property is merely for the purpose of designating the individual pieces of property, and valuing them, and supplying their places with other property when required. Said property vests in the widow, and must be set apart to her whether or not she has any infant children; the only difference being that, if there are no infant children residing in the family, there shall be nothing set apart for their support. The case of Southerland v. Southerland's Adm'r, 5 Bush, 591, is relied on as establishing the fact that a verbal antenuptial agreement is valid between the contracting parties and volunteers. The leading facts of that case are that the husband before marriage verbally agreed that his intended wife should retain her slaves, etc., after marriage, as her separate estate; and after marriage, and until her death, he uniformly adhered to this agreement, and recognized said property as her separate estate, and she always claimed it and controlled it, as such; and, after the husband's death, the court said that, as between volunteers claiming the property by virtue of the husband's marital rights and the wife, equity would uphold that agreement as consistent with the husband's power, he being sui juris all the time, to let the wife retain her property as her separate estate; but the wife has no power to relinquish her marital rights unless she pursues the law in that regard. The fact that the agreement was called antenuptial simply had reference to the fact in that case that it was made before marriage. The judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

WHITE v. BIGELOW et al.

(28 N. E. 904, 154 Mass. 593.)

Supreme Judicial Court of Massachusetts.
Suffolk. Nov. 16, 1891.

Appeal from supreme judicial court, Suffolk county.

Bill by Abram White against Charles B. Bigelow et al., to set aside a deed made by his deceased wife in her life-time to defendant. From a decree for defendants on demurrer plaintiff appeals. Affirmed.

M. R. Thomas, for plaintiff. Hutchins & Wheeler, for defendants.

LATHROP, J. The plaintiff brings this bill, "as he is administrator of the estate" of his deceased wife, for his own benefit as her husband, and alleges that, before their marriage, "she, for the purpose of inducing him to marry her, informed him of the amount and value of her estate, and promised and agreed with him that if he would marry her he should thereupon and thereby be the owner of all her estate, with the privilege on her part of retaining the management and possession of the same for and during her natural life, for his own and her benefit, and the benefit of his son, Eugene"; that he, in consideration thereof, did marry her, but that she, in violation of her agreement, with intent to deprive him of said property, and to evade and violate the laws of the commonwealth, made a certain indenture, a copy of which is annexed to the bill. By the indenture, which is dated February 5, 1889,—21 days before her death,—Sarah E. White conveyed to the defendant Bigelow certain personal property, in trust, to apply so much of the income and principal as he should see fit for her support during her life, and on her decease to pay her debts, and distribute the balance among the other defendants, in various amounts, as stated in the indenture. The bill further alleges that in confirmation of her offer, conversation, and agreement she wrote and signed a letter to the plaintiff, a part of which is as follows, the remainder of said letter, containing the signature, having been lost: "We talked last fall. You will remember what I said about my income. All I have will be yours and Eugene's when I have done with it, but I must hold it while I live. I will do what I said in regard to business, the loan we have talked of, etc. I will go to Townsend Thursday, if you wish. Please write Tuesday, so that I can receive it in season. Thursday, unless it actually storms; if cloudy, will go. Do not feel that there is any change in my feelings towards you. Indeed, am more attached to you now than ever; but it is best for us to decide as we can hold out." The bill contains other allegations, which the plaintiff contends amount to a charge of fraud and undue influence on the part of the defendants in obtaining the indenture from Sarah E. White. The bill further alleges that the plaintiff never at any time assented to the execution of the

indenture or to the disposition of said estate or any part thereof; but, as administrator of said intestate's estate, he has demanded the same from the defendant Bigelow, and Bigelow has refused to give it up. The prayer of the bill is that the indenture may be decreed to be void, and that the defendants may be ordered to deliver to the plaintiff any of the estate of the intestate in their possession or control, held or claimed to be held by them under said indenture. A general demurrer was filed to the bill; and, after the bill had been twice amended, so as to read substantially as above set forth, the demurrer was sustained, and, the plaintiff stating that he had no further amendment to offer, the bill was dismissed, with costs, and the plaintiff appealed. Although the bill states that it is brought by the plaintiff, "as he is administrator of the estate" of his wife, it alleges that it is brought for his own benefit as her husband. It seems to us, therefore, that the plaintiff does not seek to recover the property alleged to have been conveyed by the indenture as assets of the estate of his intestate, but for his own benefit, by virtue of the alleged antenuptial agreement. This agreement is alleged to have been made in consideration of marriage. The statute of frauds requires the agreement, or some note or memorandum of it, to be in writing, and signed by the party to be charged. Pub. St. c. 78, § 1, cl. 3; Chase v. Fitz, 132 Mass. 359; Peck v. Vandemark, 99 N. Y. 29. To satisfy the statute, the agreement or memorandum must, either by its own terms or by reference to some other writing, express with reasonable certainty all the conditions and essential elements of the bargain. See Freeland v. Ritz, 154 Mass. 267, 28 N. E. 226, and cases cited. The plaintiff here relies upon an oral agreement and upon a fragment of a letter. No action can be maintained upon the oral agreement unless the letter is a sufficient memorandum of it. But the fragment set forth is not the letter, but only a portion of it. Although the rest of the letter is alleged to have been lost, the entire contents, or the substance thereof, should be set out, that the court may see what the promise was, if any, that the intestate made. Considering the fragment of the letter by itself, the words, "All I have will be yours and Eugene's when I have done with it, but I must hold it while I live," are the expression of an intention to give the property to the plaintiff in the future, rather than an agreement binding upon her and her estate. Maunsell v. White, 4 H. L. Cas. 1039; Caton v. Caton, L. R. 2 H. L. 127; Maddison v. Alderson, L. R. 8 App. Cas. 487. The words at the end of the fragment, "It is best for us to decide as we can hold out," also tend to show that no specific agreement was made. In the view we have taken of the scope of the bill it is entirely immaterial whether the defendants obtained the conveyance from the wife by fraud and undue influence or not, and we need not consider the allegations of the bill in this particular. The allegation that his

wife executed the indenture to evade and violate the laws of the commonwealth is, for the same reason, immaterial; and it may be added that the plaintiff has not in his brief pointed out any law which he contends has been

violated. If the bill can be construed as seeking not only to obtain the property for the plaintiff's own benefit, but also as assets of his wife's estate, it is clearly bad for multifariousness. Decree affirmed.

MANNING v. RILEY.

(27 Atl. 810, 52 N. J. Eq. 39.)

Court of Chancery of New Jersey. Oct. 17,
1898.

Bill by Teresa V. Manning against Margaret A. Riley to set aside a marriage settlement. Heard on pleadings and proofs taken orally. Decree for complainant.

John O. H. Pitney, for complainant. Edward A. Day, for defendant.

VAN FLEET, V. Q. The complainant is a judgment creditor of John M. Riley, and she brings this suit to procure a decree adjudging that a settlement made by her judgment debtor on his wife, the defendant in this case, is without force, as against her judgment, because it was made by way of gift, and without consideration. The defendant, on the contrary, insists that the settlement rests on a consideration sufficient to make it valid against the complainant's judgment. The facts are not in dispute. The defendant and John M. Riley intermarried on the 15th day of August, 1878. She was a widow, and he was a widower. The defendant says, just prior to their marriage, Mr. Riley promised that, if she would marry him, he would give her his homestead house and lot. When required to state more in detail the circumstances under which the promise was made, she said that she did not object to marrying Mr. Riley, but she did object to going to his home to live, because some of his children and grandchildren were living with him, and that she told him so, and then proposed that after their marriage he should come to her house, and make that his home. To this, she says, he replied that he was very much attached to his garden, and did not want to leave it, and that if she would consent to marry him, and go to his house to live, all of his children, except one son and a grandchild, should leave and go elsewhere, and he would also give her his homestead house and lot for herself. This promise, though made prior to the 15th day of August, 1878, was not performed until February 14, 1888. Mr. Riley, then, through a third person, conveyed his homestead, for a nominal consideration, to the defendant. The reason her husband did not fulfill his promise earlier, the defendant says, was because she told him that a conveyance to her might create an enmity between his sons and himself, and perhaps, also, between them and her, and that his word was all she wanted. The debt on which the complainant's judgment is founded arose in January, 1883, more than five years before the settlement in controversy was made.

The above summary exhibits all the material facts of the case. No evidence in proof of the antenuptial contract on which the defense rests was produced, except that of the defendant herself; and the truth of her evidence on that point stands entirely uncor-

roborated. Not a single fact or circumstance was proved by the oath of any other witness, or in any other way, which goes to substantiate or confirm the truth of her evidence on that point. With the evidence in this condition, I think it may well be doubted whether the evidence is sufficient to warrant a judicial finding that the contract alleged was in fact made; but, in order to determine the question mainly discussed by counsel on the argument, it will, for present purposes, be assumed that the contract on which the defense rests has been proved as alleged, and that the promise of the husband to make a conveyance was made to induce the defendant to consent to marry him, and not to induce her to consent to go to his house to live after their marriage.

If the settlement in question was voluntary, the complainant's right to have it set aside as fraudulent, as against her debt, is, under the established law of this state, uncontested. The rule on this subject laid down by Chancellor Kent in *Reade v. Livingston*, 3 Johns. Ch. 481, 500, has been for so long a period, and in so many instances, adopted by the courts of this state as the rule of judgment in such cases, that it must be considered so completely and thoroughly settled that any attempt by counsel to induce this court to change or overthrow it should be regarded rather as an exhibition of rash courage than as a display of discretion. And that rule is "that, if the party be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts, and no circumstance will permit those debts to be affected by the settlement, or repel the legal presumption of fraud. The presumption of law, in this case, does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party. There is no such distinction set up or traced in any of the cases. The attempt would be embarrassing, if not dangerous, to the rights of creditors, and prove an inlet to fraud. The law has therefore wisely disabled the debtor from making any voluntary settlement of his estate to stand in the way of his existing debts." Out of the multitude of cases in which the courts of this state have enforced this rule, two, only, will be cited: *Haston v. Castner*, 31 N. J. Eq. 697, 704; *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 296, 17 Atl. Rep. 946.

The question, then, upon which the decision of this case must turn, is, was the settlement voluntary? It is admitted that it was founded upon an antenuptial parol promise, and that it has the support of no other consideration. Prior to the enactment of the statute of frauds, such a promise was held to be a sufficient consideration to support a postnuptial settlement. The reasoning was this: The marriage having been procured by means of the promise to make a settlement, the promisor, having received the consideration for his promise, thereby became

bound, according to the ordinary principles of justice, to keep his word and perform his promise. May, Fraud. Conv. 370. But this rule was abrogated by the statute of frauds. That statute, in substance, ordains that no action shall be brought to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought shall be in writing, and signed by the party to be charged therewith. Revision, p. 445, § 5. This provision of our statute is almost a literal transcript of the original statute of Car. II. The purpose of the statute is plain. It was designed to render hasty and inconsiderate oral promises, made to induce marriage, without legal force, and thus to give protection against the consequences of rashness and folly. Lord Cranworth, in *Warden v. Jones*, 2 De Gex & J. 76, 82, described the object of the statute, and the duty of the courts in maintaining it, in these words: "Persons are so likely to be led into such promises inconsiderately that the law has wisely required them to be manifested by writing; and it is the duty of this court to act in conformity with the statute, and not to endeavor to escape from its generally very salutary enactments in consequence of its operating harshly in a particular case." Now, if an antenuptial parol promise to make a settlement cannot be made the foundation of an action,—and that is the express mandate of the statute,—it follows, necessarily, that such a promise imposes no legal duty on the promisor. By making it, no legal duty is imposed, or obligation incurred; and its breach, consequently, creates no legal liability. Its performance, therefore, is an act of pure grace,—the doing of a favor, and not the doing of a duty,—and so is voluntary, in the strongest sense of that term. But it has been said that, while such a promise imposes no legal duty, it creates a moral obligation, and that such an obligation should be held to be a sufficient consideration for a postnuptial settlement, and free it from the imputation of fraud, even as against creditors. The answer, however, made by Lord Northington in *Spurgeon v. Collier*, 1 Eden, 55, 61, and adopted by Lord Cranworth in *Warden v. Jones*, supra, to this argument, must, I think, be considered conclusive. Lord Northington said: "If such a parol agreement were to be allowed to give effect to the subsequent settlement, it would be the most dangerous breach of the statute, and a violent blow to credit, for any man, on the marriage of a relation, might make such promise, of which an execution never could be compelled against the promisor; and, the moment his circumstances failed, he would execute a settlement pursuant to his promise, and defraud all his creditors."

The defendant has performed her part of the antenuptial contract. She married the man who promised to make a settlement on her. There are cases where parol contracts

within the statute of frauds may be taken out of its operation by part performance, and thus made enforceable in equity. The special ground upon which relief is given in this class of cases is that, the statute being designed to prevent fraud, justice should not permit it to be used as an instrument of fraud, or as a shield by the frauddoer. But marriage, standing alone, has never been regarded as a sufficient part performance of an antenuptial parol contract to withdraw the contract from the operation of the statute. This was so decided as early as 1720 in *Montacute v. Maxwell*, 1 P. Wms. 618, 620. The rights of creditors were not involved in this case. The bill was filed by a wife to compel her husband to make a settlement in conformity to his antenuptial parol promise. On the hearing, the principal argument urged in behalf of the wife was that she, by marrying the defendant, had fully performed her part of the contract, and that the contract was thereby taken out of the statute, and thus became enforceable in equity. But the court held that the wife was not entitled to a decree; declaring that where there is no fraud, only relying upon the honor, word, or promise of the defendant, the statute making those promises void, equity will not interfere. The principle laid down in this case has been uniformly adhered to by the English courts. Lord Cottenham, in *Lassence v. Tierney*, 1 Macn. & G. 551, 571, in commenting on what he had said in *Hammersley v. De Biel*, reported in a note to 12 Clark & F. 61, said: "A parol contract, followed only by marriage, is not to be carried into effect, marriage being no part performance of the contract. If it were, there would be an end of the statute, which says that a contract in consideration of marriage shall not be binding, unless it be in writing; but, if marriage be part performance, every parol contract followed by marriage would be binding." And Sir John Romilly, M. R., in *Warden v. Jones*, 23 Beav. 487, 490, held that where a man enters into a parol contract with his intended wife, and nothing follows but the marriage, the marriage cannot be treated as part performance, and that the carrying into effect the parol contract after marriage, by a deed, amounts to no more than a voluntary settlement. The same principle has controlled the decision of other cases. *Redding v. Wilkes*, 3 Brown, Ch. 400; *Dundas v. Dutens*, 1 Ves. Jr. 196, 199; *Caton v. Caton*, 1 Ch. App. 137. In Story's *Commentaries on Equity Jurisprudence*, it is said, (volume 1, § 768:) "If there has been no fraud, and no agreement to reduce the settlement to writing, but the other party has placed reliance solely upon the honor, word, or promise of the husband, no relief will be granted, for in such a case the party chooses to rest upon the parol agreement, and must take the consequences; and the subsequent marriage is not deemed a part performance, taking the case out of the

statute, contrary to the rule which prevails in other cases of contract. In this respect, it is always treated as a peculiar case, standing on its own grounds." That marriage, alone and of itself, is not such a part performance of a parol antenuptial contract as will withdraw the contract from the operation of the statute of frauds, and render it enforceable in equity, must, I think, be considered the settled law both of this country and England. Many of the cases so adjudging will be found cited in May, *Fraud. Conv.* 373; Fry, *Spec. Perf.* p. 263, § 408; Wat. *Spec. Perf.* p. 390, § 288.

But it is argued that an entirely different doctrine was established by this court in *Satterthwaite v. Emley*, 4 N. J. Eq. 489; the contention being that Gov. Haines, sitting as chancellor, decided in that case that a marriage contracted by a woman, under an antenuptial parol promise to make a settlement on her, constituted a sufficient consideration to give validity to a postnuptial settlement made in pursuance of such promise. I do not think the case can be understood to declare any such doctrine. The bill in that case was filed to procure a decree giving effect, in favor of the wife, and against the creditors of her husband, to an antenuptial parol contract by the husband to make a settlement. The wife failed to prove the contract on which her suit was founded, and the court so found. With that finding, the case ended. The court, with the case in this condition, was not required to consider what effect, if any, could be given to the contract. That question could not arise until the contract was first established by proof. Nor do I understand that any opinion, uttered as a deliberate judgment, was expressed upon that question. The most that the chancellor did was to intimate the inclination of his mind. He said that, if the contract alleged had been proved, he should have been inclined to hold that a settlement made in pursuance of it was valid. "Such settlement," to speak in his own words, "could not be considered voluntary, but upon a good and valuable consideration, to wit, the marriage, and the conveyance of all the wife's estate." Subsequent to the marriage, it appeared that the wife had conveyed all her lands, through a third person, to her husband, in order, as it was alleged, that they might be conveyed to a trustee in fulfillment of the antenuptial parol contract. If the lands of the wife were conveyed to her husband upon his promise to convey them to a third person

in settlement upon her, there can be no doubt that his promise bound him in equity; nor that the wife's conveyance would, in that case, have constituted a perfect consideration for a settlement upon her, provided it had been made promptly, and before her husband had made use of the ownership of the lands as a means of obtaining credit, for, in that case, it will be observed that the wife would have done something more than marry, namely, have conveyed her lands. In this situation of affairs, the duty of the court would be plain. It would be bound to enforce that rule of equity jurisprudence which declares that if a man make a promise to another person for the purpose of inducing that person to do an act, and the act is done on the faith of such promise, the promisor will be held to his word, and be compelled to do what he promised. *Warden v. Jones*, 23 Beav. 487, 493; *Hammersley v. De Biel*, 12 Clark & F. 62. It is thus made plain, as I think, that the judgment of the court in *Satterthwaite v. Emley* does not give the slightest countenance to the notion that marriage, alone and of itself, is a sufficient consideration to give validity, as against creditors, to a postnuptial settlement made in pursuance of an antenuptial parol promise, and yet that is the only consideration on which the settlement in this case rests. The conduct of the settler was, as against his wife, entirely free from fraud or wrong of any kind. He would have fulfilled his promise at a time when he could have made a voluntary settlement which would have been perfectly valid against the complainant's debt, if the defendant had not persuaded him not to do so. Her conduct, as she describes it, was so unselfish and confiding as to be worthy to be called magnanimous. To prevent her husband's children from losing confidence in his love, and to preserve their affectionate relations, she persuaded him, after the marriage, not to settle his homestead on her then, assuring him that his word was all she wanted. She put her trust in what, under the law, is without the least legal force. This may be the proper subject of regret, but it can have no influence whatever on the judgment of the court. The demands of justice are superior to the claims of affection or benevolence. The law requires a debtor to be just before he is generous; to pay his debts before he attempts to dispose of his property by gift. The deeds in question were executed in fraud of the complainant's rights, and must be set aside.

BARRON v. BARRON et al.

(24 Vt. 875.)

Supreme Court of Vermont. Windsor. March Term, 1852.

Appeal from chancery court. Windsor county.

This was a bill in equity. The lower court dismissed the bill, and the orator appeals.

Washburn & Marsh, for appellant. Tracy, Converse & Barrett, for appellees.

ISHAM, J. The object of this bill in chancery is to perfect the title of the orator to that portion of the premises therein described, which was conveyed by Jedediah Kilburn to Azuba Sessions, and upon which his execution against Rufus Barron was levied. The bill charges, that the premises were contracted for at the price of \$1800, that the deed was executed to Mrs. Sessions for the purpose of keeping the property from the creditors of Rufus Barron, and that a fraudulent agreement to that effect was made between them. The orator further states, that Rufus Barron was possessed of \$1100 in money, and paid that amount towards the purchase, and insists, that to that extent Rufus Barron has an equitable interest in the land, subject to be taken on his execution, and that a legal title to the premises upon which his execution was levied, should be perfected in him by decree of this court.

The bill is taken as confessed by Rufus Barron, but answered by the other defendants. Mrs. Sessions, in her answer, denies the facts stated, and the whole equity of the orator's bill. The defendants Baxter and Parkhurst, admit, that they are grantees and purchasers of the premises by regular conveyances from Mrs. Sessions to Baxter and from Baxter to Parkhurst, and that at the time of the conveyances they respectively had notice of the orator's attachment; so that their right and title is held subject to the claim of the orator under his attachment, as it may be perfected at law or in equity. The recovery of the judgment in favor of the orator v. Rufus Barron, the issuing an execution thereon, and the levy of the same on the premises in question, are facts not disputed; and it is equally undeniable, that the orator has laid a proper foundation for sustaining this bill, by exhausting his *remedies at law in seeking satisfaction of his execution. The conveyance from Kilburn to Mrs. Sessions was made October 20, 1841, and was paid for at the time by the notes of Mrs. Sessions, with the understanding, however, that the notes were to be paid by the application of about \$1,100 coming to Melinda, the wife of Rufus Barron, from the estate of her father, and which was then in the hands of the administrator; and the balance was to be paid by Mrs. Sessions from her own estate. It is evident, from the testimony in the case, that the deed was executed to Mrs. Sessions by the

request of Melinda, and with the consent of Rufus Barron, for the purpose of placing the amount so paid from the distributive share of Melinda in the hands of her mother, as trustee, to preserve the same for her sole use and benefit and as her separate estate, so that in no event it should become the property of her husband, or subject to the inheritance of his children by a former wife. The case is free, therefore, from any question of fraud in fact, arising from the execution of the deed to Mrs. Sessions; for it does not appear, that Rufus Barron was any where indebted at that time, and the claim of the orator accrued several years after this transaction.

Mrs. Sessions admits, however, that her personal interest is only to the extent of about \$700, and that she holds the remainder as trustee for her daughter Melinda; and insists that it belongs to Melinda as her separate property, independent of any claim of her husband or his creditors. This answer is conclusive upon her as to the extent of her personal interest in the premises; and though the deed may contain the statement, that its consideration was paid by Mrs. Sessions, and contains no recital of a trust interest, yet, she is as much chargeable as trustee, by the acknowledgment of the trust in her answer, as if the deed contained an express declaration of the trust. 2 Story's Eq. § 1201, and note 2. 2 Atk. 155.

The important inquiry, therefore, in the case is, who is really the *cestui que trust* under this deed, of that portion of the premises paid for by Melinda's share from the estate of her father? The question is presented free from any embarrassment arising from questions of fact; for we learn from the testimony, that the marriage of Rufus Barron with Melinda took place Sept. 6, 1841, while her father deceased April 11, 1840; so that the distributive *share vested in the *390 wife of Rufus Barron prior to their marriage, and her title thereto, though not reduced to her actual possession, became absolute and unconditional.

We are enabled to obtain an answer to the inquiry, which of these parties is entitled to that trust estate contained in the deed to Azuba Sessions, by ascertaining to whom belonged the money which was paid for its purchase. For it is a common principle in equity, "that where one buys land in the name of another and pays the consideration money, the land will generally be held by the grantee in trust for the person who so pays the consideration." This, says Justice STORY, "is an established doctrine, and not open to controversy." 2 Story's Eq. § 1201, and note 2. Such conveyances create a resulting trust, which is not the subject of seizure or sale. But by the levy of an execution upon the premises there is created an equity in behalf of the creditor, which can be reached by the aid of a court of chancery; and this is one of the most important sources of equitable jurisdiction and power. McDermott v. Strong, 4 Johns. Ch. R. 687. Scott v. Schooley, 8

East. 467. *Waterman v. Cochran et al.*, 12 Vt. 699.

If in this case the money paid for the land was the property of the wife, constituted part of her separate property, and was subject to her sole disposition and use, then it is evident a court of equity should protect it for her benefit. But if by the marriage, or otherwise, that money became the absolute property of Rufus Barron, and as such was vested in real estate, then he has the equitable interest therein; he alone is the *cestui que trust*, and the property is held by the trustee for his benefit. In such case it is the duty of a court of equity to protect the title of this plaintiff under his levy, by decreeing the payment of his execution, or the conveyance of the legal interest in the premises upon which the execution was levied, as prayed for in the bill.

At common law, by the marriage the husband is seized of the freehold, *jure uxoris*, of all lands, of which she was seized of an estate of inheritance, at the time of their marriage. Co. Litt. 351, *a*. And he takes the rents and profits during their joint lives, and, in case of his survivorship, in some cases, during his natural life, as tenant by the courtesy. If she is seized of an estate for her own life, or *per autre vie*, the husband is seized thereof in right of his wife, and is entitled to the rents and profits. To *391 *all her chattels real, the husband becomes entitled, with the power to sell and otherwise dispose of the same, as he pleases during his life; and in case of his survivorship they become absolutely his. Of all her personal chattels capable of immediate and actual possession, he becomes likewise the absolute owner. To her choses in action, as debts due by bond, note, simple contract, or otherwise, he has a qualified right, rendered absolute by reducing them into possession during coverture; if not so reduced, they pass to the administrator of the wife. 2 Kent's Com. 118.

This right of the husband to the property of the wife is acquired in consideration of the obligation resting upon him by the marriage to pay her debts, as well as to maintain her and her children. But while this right is given to the husband over the property of the wife, no provision at common law is made to secure the performance of the corresponding duties of the husband to the wife,—as having this claim to her property, he is enabled to transfer and dispose of it, or, upon his bankruptcy and insolvency, the property would vest in his assignees for the benefit of his creditors, and his wife, whatever may have been her fortune, may, with her children, be left destitute of the means of subsistence. To remedy this deficiency in the common law, courts of equity, from the earliest period, have exercised their power by giving to the wife a right to a provision out of her own property, and which is termed, the equity of the wife. It was formerly considered, that this equity could be protected only where the husband was seeking the aid of a court of eq-

uity to obtain possession of the wife's property. 1 P. Wms. 460. 2 Story's Eq. § 1414. But since the case of *Lady Elibank v. Montolieu*, 5 Ves. 737, the wife is permitted to actively assert her claim in equity, as plaintiff. "The equity is the same, in whatever form or by whomsoever presented." 1 Lead. Cas. in Eq. 383.

It was also formerly considered, that this equity was confined to the absolute personal property of the wife. But afterwards it was extended to the rents and profits of real estate in which she had a life interest. And at the present day this equity has a more extensive application, and is attached to the rents and profits of all her real estate, whether legal or equitable, whether they are of inheritance, or for life, and whether leasehold estates, or a trust term for years. Clancey 445-6.

5 Myl. & Craig 97, 101 *to 103, *Sturgis* *392 v. *Champneys*; 4 *Hare* 1, *Hanson v.*

Keating; 2 Story's Eq. § 1410. And whatever qualification may be found in the application of this doctrine to different cases, that qualification has no existence, where the husband and wife are living separate and apart, without any fault on the part of the wife, nor in case of the bankruptcy or insolvency of the husband. 5 Vesey 517, *Lumb v. Milnes*; 10 Beav. 324, *Wilkinson v. Charlesworth*, and *Marsack v. Lyster*. In which Lord LANGDALE disapproved of the case *Vaughan v. Buck*, 18 Sim. 404.

In relation to her personal property, as well as her choses in action, this equity of the wife will equally be protected. It has been, and with some qualifications, is now held, that if her personal property had been actually reduced into possession, and is not a mere right or thing in action, so that a complete legal right is vested in the husband, the wife's equity can no longer be enforced. 1 Eq. Lead. Cas. 351. And that whenever he was pursuing the common remedies at law for the purpose of reducing into possession, the personal property of the wife, courts of equity will not interfere, but will ordinarily remain passive. 2 Story's Eq. § 1408. But it is now held, and the cases are not unfrequent, in which the husband has been restrained by injunction from enforcing his legal remedies to obtain the wife's property, or reducing to possession, the wife's choses in action, for the purpose of enforcing her equity to a settlement. 2 Kent 121 and note 6. Clancey on Mar. Wom. 466. 1 Eden, 506, *Mason v. Masters*; 1 Roper on Hus. and Wife, 271. 2 Sim. 167, *Pierce v. Thornley*; 5 Johns. Ch. R. 477, *Kenny v. Udall*; 4 Paige, 74, *Van Epps v. Van Deusen*, and this is regarded as a salutary rule in case of the insolvency of the husband, or separation from his wife without fault on her part. In the case of *Eedes v. Eedes*, 11 Sim. 569, it was held, that where a married woman left her husband, and was living separate from him, but not in a state of adultery, she was entitled to a settlement out of a sum in stock, to which her husband had become entitled in

her right. If the husband has obtained the possession of the property without suit, and it still remains in his hands, he will, in many cases, be adjudged the trustee of the wife; this was so decided in this State in the case of *Porter v. Bank of Rutland*, 19 Vt. 410. 2 Kent 146. *Clancey* 260. If the property of the wife have been received and appropriated by the husband to his use, *393 other *circumstances must determine, whether the wife has lost her equity.

If they were living together, and the property have come into his possession, and so have been appropriated by her consent, it will be presumed a gift to her husband, and her equity will be lost. But if the property have been so appropriated under circumstances showing that it was to be repaid, then she will stand in equity, as the creditor of the husband, and her claim will be enforced against his executors. Thus where a wife advances money from her separate property, to redeem a mortgage on her husband's estate and takes a receipt for the money, she will stand in the place of the mortgagee, and the heir must redeem it from the wife. *Reeve's Dom. Rel.* 165. And Lord THURLOW ruled, that if a wife mortgaged her separate real estate for her husband's benefit, it will be considered the debt of the husband, and that it should be satisfied out of the assets of the husband's estate. 1 Ves. Jr. 186, *Clin-ton v. Hooper*; and Judge REEVES remarks, that wherever it appeared from the evidence, that the wife had claimed, that her husband was debtor, or that he had recognised himself as such by proposing to pay her, she is considered, on the death of the husband, as a creditor. *Reeve's Dom. Rel.* 165.

This equity of the wife, is also sustained in relation to the distributive share of an estate, to which she is entitled by inheritance, and whether that right became vested in her before or after marriage. The right of the husband to that species of property is purely marital, and which a creditor cannot exercise for the husband, against his will. In New Hampshire, in the case of *Parsons v. Parsons*, 9 N. H. 309, it was held, that a distributive share of an intestate estate, to which a *feme covert* is heir, does not vest absolutely in the husband, but he has simply the same qualified right that he has to her other choses in action. The same doctrine was sustained in *Wheeler v. Moore* and Tr. 18 N. H. 478—PARKER, C. J., uses this emphatic language:—"That a husband has a right to claim such distributive share to his own use, but that he is not obliged to exercise that right. If he omit so to do, on his death, the right will survive to the wife in her own right, and as heir to the estate, and if he neglect or refuse to reduce it to possession, it is clear, that after his death, neither his heirs, or creditors, could assert any claim to it." And it was held in that case, that such property, until so reduced to possession, was not at law *subject to an attachment at the *394 suit of the creditors of the husband, or

to the process of foreign attachment. 12 N. H. 164, *Marston v. Carter*.

In Mass., at law, the decisions are otherwise, and the interest of the husband in his wife's distributive share of an intestate estate is subject to be attached, in the hands of the administrator, by the trustee process, at the suit of a creditor of the husband. This right is there, as it is now in this State, given by express statute, and extends to legacies and other effects in the hands of the administrator. C. 109, § 62; 20 Pick. 563, *Wheeler v. Bowen*; Ibid. 517, *Hayward v. Hayward*. But in the last case it was held, that if the husband died without reducing the property into possession, it survived to the wife. And in the case of *Davis v. Newton*, 6 Met. 537, on a bill in equity, it was ruled, that whatever may be the rights of the creditors at law, yet at any time before distribution, the court will protect the equity of the wife, and compel them to make suitable provision for her support, and that of her children.

In New York, Chancellor KENT observes:—2 Kent 123, 114, that the leading provisions and principles of the English courts of equity, have been incorporated into the equity jurisprudence of that State, and that legacies and distributive shares accruing to the wife during coverture, stand on the same footing, the husband having simply a qualified interest therein, subject to the equity of the wife. 6 Johns. Ch. 178, *Haviland v. Bloom*; 5 Johns. Ch. 198, *Schuyler v. Hoyle*.

In this State, a similar view has been entertained, and the case of *Short v. Sampson and Trustee*, 10 Vt. 446, contains the elements of the doctrine in relation to the equity of the wife, as it is held by the courts of chancery in England and most of the States in this country. In that case it was held, as in New Hampshire, "that the husband has no such interest in money decreed by the probate court to be paid to the wife by the administrator, as her distributive share in her ancestor's estate, as could be attached by the creditors of the husband;" and the reason assigned is this—"that the right of the husband to this share, even after decree of distribution, is only conditional; no specific money passes by the decree. It is, at most, a mere chose in action, and as such, belongs to the wife, until the husband reduce *395 it to posses*sion." And in relation to the equity of the wife, the court say, "that in chancery, such choses in action are treated as the separate property of the wife, and on application will interfere to prevent the husband from squandering such property, and compel him to make suitable provision for the wife, or else appoint a receiver for her benefit; and that it would be unreasonable to permit the creditors of the husband to reach such property." In this case, there is made a direct application of the doctrine of the wife's equity to her distributive share in the estate of her ancestors, as against the husband and his creditors. In all these cases, to which we have referred, the property of the

wife, whether acquired by gift, devise, or inheritance, before or during coverture, is regarded as the property of the wife and not of the husband;—and if that right has not been expressly and formally waived, or forfeited by misconduct, it will be protected in equity against the husband in any proceedings, which may be adopted at law, or otherwise, for the purpose of reducing it to his possession. And will be equally protected against his assignees, or creditors; for it has been justly observed, that the “equity of the wife is paramount to the interests, powers, and rights of the husband, and of all persons dealing with him.” 1 Lead. Cas. in Eq., 352;—and by Lord LANGDALE it was held, that this protection would be equally extended to the income of the property, in case of the insolvency of the husband, or their separation. 10 Beav. 324, Wilkinson v. Charlesworth.

The amount embraced within this equity of the wife, rests in the discretion of the court; formerly it was limited to one half.—In the case of Davis v. Newton, 6 Met. 544, “it was held by Ch. J. SHAW, that the amount depended upon circumstances—as the amount of the property belonging to the wife, her age, health and condition, as well as the number, age and condition of her children. In this respect, where the matter comes properly before the court, it is competent for the chancellor to obtain the aid of a master to inquire into their circumstances, and to report what sum would be a suitable provision. But in cases where the property is small, and has been kept entirely distinct from the husband, and where it is evident, that the exigencies of the family require it, it would be proper to appropriate the whole of such property to the use of the wife and her children;” and *396 also the *interest or income of the property, in case of their separation, or insolvency. 1 Lead. Cas. in Eq., 353. 5 Johns Ch. R. 464, 478. 6 W. 25. 3 Kelly 198, 205.

The application of these principles, to this case, is not a matter of much difficulty. The money, to which the wife of Rufus Barron was entitled by inheritance from the estate of her father, was in the hands of the administrator at the time of the marriage and purchase of the farm. But little has been paid to her; some was paid to her husband, by her consent. The arrangement, for the purchase of the farm and manner of payment therefor, was a matter of mutual consent and agreement between the husband and wife and trustees, for the purpose of preserving the property as the separate estate of the wife; and the amount paid by the administrator to the holder of the notes given for the farm, was paid in pursuance of that mutual arrangement and agreement; and to that extent, we think it clear, that the money paid was the property of the wife. And it is equally evident, that the same consequences follow in relation to the money handed by the administrator to the husband for the purpose of paying the balance due on those notes from the wife. The facts in relation to the man-

ner in which the money was handed to him by the administrator, are not disputed. When requested by the administrator, he refused to collect the notes belonging to his wife, for the purpose of paying the notes given for the farm, saying that no part of that estate should come into his hands,—but he consented, if the money was collected by the administrator, to carry the money to the holders of the notes, if it would be an accommodation to him.

If this, as has been contended by counsel, can be considered as a reduction of this property into possession by the husband, still as it was immediately applied upon the notes given for the land, in pursuance of their previous arrangement, no court of equity could refuse to protect it, as the property of the wife, the same as if the money had been sent by other hands. But the authorities are clear, that that was not such an act in reducing the property of the wife into the possession of the husband, as can affect the right or interest of the wife at law, or in equity. Other considerations must unite with the fact of actual possession, to affect her right of survivorship, or her equity to a settlement. To produce such results, Chancellor KENT remarks, 2 Kent, 118,—the possession of *the husband must be in his character *397 as husband, obtained in the exercise of his marital rights, and for the purpose of its appropriation to his own use. In the case of Baker v. Hall, 12 Ves. 497, the wife was residuary legatee; and the husband took possession of the real and personal estate of the testator, as executor; and it was held by the master of the rolls, that, as he took possession in that character, and not as husband, it could not be deemed sufficiently reduced into possession to prevent its survivorship to the wife. In Wall v. Tomlinson, 16 Ves. 413, a transfer of the wife’s stock to the husband, as trustee, was held not to be a reduction into possession, so as to bar the wife’s survivorship; for it was made *diverso intuitu*.

The case under consideration, is stronger than those, in behalf of the wife. As the money was handed to the husband by the executor and trustee of the wife, for the specific purpose of its appropriation in payment for the land, and in that character was received by the husband, under his disclaimer of any right thereto. It is difficult to conceive of a case, where the property of the wife has been kept more distinct from the husband, than in this, and for the purpose of securing her maintenance and the support of her children. In the same condition it remained, when paid towards the farm; for there had been no exercise of marital right in claiming it; and when the money was so paid, it was taken from the separate property of the wife, which it is the duty of a court of chancery to protect.

And on the execution of the deed to Mrs. Sessions, in pursuance of their mutual arrangement, the trust estate enured to the wife, from whom the consideration came, she is to be regarded as the sole *custui que trust*

under that deed, to the extent of the purchase money paid from her separate estate. Her interest is purely equitable, and can be obtained only by the aid of a court of equity; and chancery will not permit that property to be taken from its jurisdiction by the husband, or his creditors, until there has been secured the equity of the wife.

This view of that part of the case renders less important the examination of the case in relation to the post-nuptial agreement between Rufus Barron and his wife, yet as the question is directly presented in the case, it is proper to remark, that the agreement evidently would be of no avail at law. At *398 common *law the husband and wife are treated as one person; her legal existence is merged in that of her husband; their contracts, made when single, are avoided by the intermarriage; when made during coverture, they are of no binding obligation; the husband can neither grant to, or covenant with his wife, for that supposes her to possess a distinct and separate existence. From this principle arises the necessity, at law, of all conveyances, covenants, marriage settlements, and the like, being made through the interposition of trustees. Story's Eq. § 1380. 2 P. Wms. 79. 2 Ves. Sr. 190. But courts of equity, for more than a century, have disregarded that rule, and for many purposes treat husband and wife as distinct persons, capable of contracting with each other, and of having separate estates, debts and interests. Story's Eq. § 1368. 2 Johns. Ch. 539. And as a general rule, whenever a contract would be good at law, when made with trustees for the wife, that contract will be sustained in equity, when made with each other without the intervention of trustees. It is upon this principle, that in many cases the husband will be held as trustee of the wife, and the wife entitled to the privileges belonging to a creditor of the husband. Story's Eq. 1378, 1380.

The agreement in this case was made March 14, 1844, nearly three years after their marriage, and in substance, after agreeing to separate, the wife renounces all further claim upon the husband for his services, or support for herself and children, and agrees that she will contract no debts on his account; and the husband renounces all claim for her services, or support. This agreement, if carried into effect, should be enforced so as to fulfil the evident intention of the parties. Without looking at the instrument in any other light than with reference to its effect upon the property of the wife, it was manifestly his intention to renounce all his claim or marital right to her future services, as well as support from her property, leaving the same for her support and that of her children. That an agreement of that character, made directly between husband and wife, and without the intervention of trustees, will be sustained in equity, is clearly sustained by authority. Justice STORY remarks,—2 Story's Eq. § 1872,—“That if the

husband should, for good reasons, after marriage, contract with his wife that she should separately possess and enjoy property bequeathed to her, the contract would be upheld *in equity.” Chancellor Kent *399 remarks,—2 Kent 147, 154,—“That a wife may contract with her husband, even by parol, after marriage, for a transfer of property from him to her, or to trustees for her, provided it be for a *bona fide* and valuable consideration, and she may have that property limited to her separate use.” 1 P. Wms. 125. 2 Vern. 659. 2 Johns. Ch. 537. 10 Ves. 146. He further remarks, “that gifts by the husband to the wife will be supported as her separate property, if they be not prejudicial to creditors, even without the aid of trustees.” In the case of Herr’s appeal, 6 Law. Rep. 408, it was held in Penn. by Ch. J. GIBSON, that where the husband was in the habit of giving his wife the specie that came to him in the course of his business, until it amounted to \$4500, it became the property of the wife, as against the heirs at law, and in the nature of a provision for her; and this gift and contract, made after marriage, and without the intervention of trustees, was enforced against his estate. In the case of Searing v. Searing, 9 Paige 284, the husband permitted the wife, after marriage, to receive the avails of her property, which she held before marriage, and re-loan the same on securities in her own name, and afterwards gave her \$2000 which was loaned by her on like security, on her releasing her right of dower to his farm on its sale. It was held, that this gift and contract, though made after marriage and without the intervention of trustees, was binding upon the husband and his estate. And though such gifts would not be sustained against creditors, who were such at the time, yet they will be sustained against the husband and subsequent creditors. 3 Johns. Ch. 490, Reade v. Livingston. The same doctrine was sustained in this State in the case of Pinney et al. v. Fellows, 15 Vt. 536. In that case the court remarked, “that upon the receipt of property by the husband from the wife, if, after marriage, he shall, for sufficient reasons, contract with the wife, that she may possess and enjoy separately property bequeathed to her, or inherited by her, or such as she may be the meritorious cause of acquiring, equity will uphold such post-nuptial agreements, in cases in which the claims of creditors will not be prejudiced by so doing;” and chancery would need no better reason for upholding such agreements, than the insolvency of the husband and his neglect to discharge his marital obligations. The operator in this case was not a creditor, *400 *at the time of this agreement, nor until a long time afterwards,—so long, that no inference can be drawn, or suspicion arise, that it was done in view of future indebtedness.

In such case it is equitable, that this agreement should be sustained, not only against

the husband and his heirs, but against all others claiming under him, who at least were not creditors at the time, for he has parted with no property, that was his own. He has simply renounced all marital rights to the property of his wife, and which no creditor can compel him to exercise against his will, and which a court of equity would have required him to do, without such an agreement, not only in relation to the principal of her estate, but also to its income and profits, where a separation has taken place by act of the husband, or by their mutual consent.

So far, therefore, as the land, upon which the orator's execution was levied, was paid for by the property of the wife of Rufus Barron, we think this creditor can have no claim thereon for the payment of his debt.

It is further insisted, that about \$300 was paid towards the farm by Rufus Barron from his own estate, independent of the money paid from the property of his wife. This is purely a question of fact; for no question has been made of the right of this creditor to the decree prayed for, if the money was so paid by him.

We are without the aid of an answer from Rufus Barron on this subject, who, it is to be presumed, could have told the amount and circumstances attending such payment, if made. The orator, however, has produced the testimony of Mrs. Burgess, Oliver Curtis and Mr. Jennings, from which it appears, that on different occasions Mrs. Sessions has stated, that Rufus Barron had an interest in the land of about \$300, and that she was desirous of having it repaid for the benefit of his children by his former wife. Mrs. Sessions, in her answer, states the payment of the whole purchase money for the farm to have been made by her and the wife of Rufus Barron, and makes a distinct denial of any interests in him in the land. Mr. Perkins, the administrator, who assisted in purchasing the farm, and who was to see to the payment of the notes given therefor, states, that the whole sum, principal and interest, required for the payment of those notes, was raised from the property of Mrs. *401 Sessions and the wife of Rufus Barron

and furnished by him for that purpose. If the testimony rested here, there is not that preponderance of testimony, that would warrant a decree for the orator. But the circumstance, that exerts a controlling influence upon this question, arises from the settlement made in 1844, when the agreement for separation was made and signed by Rufus Barron and his wife. That settlement was made with much deliberation, and with the aid and assistance of mutual friends; and as their difficulties had brought to its final termination their cohabitation as husband and wife, it was evidently their object and design to bring to a similar termination all matters in which they had a community of interest. The terms of their mutual separation were agreed to, as well as the future possession and support of their children. The claim of Rufus Barron, arising out of the occupation and use of the farm was the subject of their negotiation and settlement, and the same motive, that induced him to present his claim for improvements he had placed on the farm, in making fences, constructing water-courses, and increasing its general productiveness, would have caused him to present his claim for money advanced in its purchase, if he had so advanced it. Mr. Perkins and Mr. Benson both testify, that he made no such claim, and that they understood the only claim he had was in right of his wife, except for the improvements and personal property; and when the amount of his claims was stated and received, and the mutual releases between Rufus Barron and his wife executed, we can but believe, that it was considered a full settlement of all claims, that he had upon them, or the premises.

It becomes unnecessary to refer to the objection made, that Mrs. Barron is not made a party to this bill, as no decree is made affecting her interests. But we cannot perceive, how a decree could have been made for the orator, affecting the interests of the wife, without her being made a party defendant. *Grant and Wife v. Van Schoonhoven, 9 Paige 255. Story's Eq. Pl. 207.*

The result is, that the decree of the chancellor must be affirmed.

In re PIERCE et al.

(Fed. Cas. No. 11,139, 7 Biss. 426.)

Circuit Court, E. D. Wisconsin. April, 1877.

[The bankrupt and his wife were examined, and their testimony fully taken touching this property. The assignee claimed it as the property of the bankrupts, or of one of them.]

This was a petition by the assignee of the district court for the possession of personal property which it was alleged was in the hands of the bankrupts [Charles L. Pierce and James M. Whaling]. The petition remained unanswered except by the affidavit referred to in the opinion.

D. S. Ordway, for assignee.

James G. Jenkins, for bankrupts.

DRUMMOND, Circuit Judge. The facts set forth in the petition to the district court were substantially these:

That the bankrupts, some time ago, had entered into business with a very small capital; that they became indebted for large quantities of goods purchased; that the indebtedness continued and increased; that they were actually insolvent, the insolvency growing greater in amount all the time; that they did a very large business, incurred enormous debts, particularly to one firm, who had advanced them large sums of money from time to time, the indebtedness being between \$300,000 and \$400,000; that they lived in an expensive manner; had extravagant furniture considering their actual pecuniary condition when they commenced the business, and at periods afterward. Articles of luxury and expensive furniture were purchased by Mr. Pierce and placed in his house; and the statement is in the petition, which we have to take as true, that he gave those things (after he had purchased them, being then insolvent, and using other people's money, the product of the goods which may be said to have belonged to others) to his wife, saying, "I give these to you."

He remained in the house; he had bought the property; there was no separation between man and wife, no severance of possession; they were both living in the house, and he having made use of the few simple words as above, it is claimed that his wife now owns this property, or that she has an adverse interest in it, and therefore that there must be a bill in chancery or a suit at law to determine the rights of the wife. Smith v. Mason, 14 Wall. [81 U. S.] 419; Marshall v. Knox, 16 Wall. [83 U. S.] 551.

Now, if it had been an article of apparel, or simply the wardrobe of the wife, or jewels, or any expensive personal articles which in a sense might be said to be appropriated to the use of the wife, it possibly might be different. But here was property in common between the husband and wife, of which there could not be a distinct, separate appro-

priation to the wife, unless the mere use of the words, "I give this to you," shall constitute a separate and distinct property, shall sever the possession, and from thenceforth the property shall be considered as the separate and independent property of the wife.

Can we tolerate such things as this? Can it be true that an insolvent merchant can fill his house with all sorts of extravagant furniture, and then say to his wife, "I give it to you," they remaining in the house and living together, and then compel the creditors, or assignee representing the creditors, to solemnly go through with what I cannot help calling the farce of filing a bill in chancery to deprive the wife of such a right as this?

I admit that wherever there appears to be an adverse interest in any one who is not before the court, the bankrupt court cannot adjudicate on the same without that person being properly before it, without setting in motion the machinery of a court for the purpose of litigating any supposed rights. But this is not an adverse interest. Does the mere fact that the husband says to the wife, "This property which I have bought and placed in my house is yours," constitute an adverse interest in the wife? I know of no law that leads to such a conclusion. There is not even an equity in the wife under such circumstances. The right of property and the possession of the property are absolutely unchanged. The statute of this state declares, I admit, as the statutes of most of the states now declare, that the wife can receive and hold as her own independent property that which she obtains from a source other than that of her husband. But it does not change the rule of law that unless it does not come from another source it still is the property of the husband.

In this case the petition alleges that the wife had no property, never has had any except her wardrobe and the usual presents made on a wedding day. It therefore rebuts the idea that any of this property whatever was purchased with the money of the wife. It was all purchased with the money of the husband, or rather the money of his creditors.

And then, again, a portion of this property was not even given by the husband to the wife. It was put upon premises, the title to which was apparently in the wife, and it is claimed to belong to the wife, because the husband bought the furniture or other articles of personal property, and put them upon the premises which the wife seemed to own. So that, whenever personal property is put by the owner upon real property owned by another, it transfers, under this view, the personal property to the owner of the real property. That certainly is a new doctrine in the law.

There is an affidavit put in, in answer to the petition to the district court, in which the husband alleges that he cannot deliver this property to the assignee because it is in the

possession of his wife. Now, if he had shown in this affidavit that there was any possession in his wife, different from his own possession, there might be something in it. But he must rebut the presumption which arises from all the facts in the case, for they are both occupying, as man and wife, jointly, a house in which this furniture is placed. It is a necessary inference, as they are thus living together, that whatever possession the wife has, she has simply because she is living with her husband in the same house, and that he has said to her, "This property is yours."

The district court thought that there was in this case an adverse interest in the wife, and therefore, under some of the decisions of the supreme court, her right must be litigated in an independent action.

Now, if there did really appear to be an adverse right, I admit the binding authority of these decisions. But for the reasons I have already stated, it is most manifest that there is no adverse right in the wife. I know of no law or equity that, under these facts, gives

her the slightest adverse right to the property. There certainly has not been any cited in this case. I think, therefore, that the bankrupt must meet the case made by the assignee in some other way than by such an affidavit as this, before the district court could of right hold that this woman can retain the property. I must say I have very little patience with transactions of this kind. If courts of justice are made to accomplish any object, it certainly is one of the very highest to protect, in the speediest possible way, the right of creditors attacked, as this case shows they have been here, and to sweep away, as a mere cobweb, such a transparent fraud as is shown in this case.

Therefore I shall remit the case to the district court, with instructions to that court to require the bankrupt to answer the petition, and then, when he has so answered, if it shall appear that there is really any adverse interest in the wife, then, of course, she will be permitted to have her right ascertained in an independent proceeding.

ILLUS.CAS.DOM.R.—6

COMMONWEALTH v. RICHARDS.

(18 Atl. 1007, 131 Pa. St. 209.)

Supreme Court of Pennsylvania. Jan. 6, 1890.

Appeal from court of quarter sessions, Allegheny county.

Act Pa. April 18, 1867, provides that where a husband has separated himself from his wife without reasonable cause, or has refused to provide for her maintenance, the wife may institute criminal proceedings against the husband, and obtain an order for her maintenance and support.

J. M. Swearinger, for appellant. *C. S. Fetterman*, for appellee.

CLARK, J. This is a proceeding under the act of 18th of April, 1867, (P. L. 78,) brought by Emma Richards against her husband, Thomas Richards, to obtain an order upon him for her maintenance and support. The complaint is that on the 20th of September, 1887, the defendant, residing in Allegheny city, "did then and there, without any cause or provocation, desert and abandon" his wife, and since that day "has failed and refused to provide anything towards her support and maintenance." At the trial in the quarter sessions the defendant offered in evidence a deed of voluntary separation dated 11th of March, 1886, by the terms of which the parties, "in view of divers disputes and unhappy differences" which had arisen between them, had consented and agreed to live separate and apart from each other during their natural lives, etc. The husband agreed to, and actually did, place in the hands of his wife, "towards her better support and maintenance," the sum of \$50 in cash, household goods to the amount of \$100, and four shares of stock in the Co-operative Foundry of Beaver Falls, Pa., of the par value of \$100 each. In consideration thereof the wife agreed to discharge the said Thomas Richards, his heirs and assigns, and his estate, from all claims, etc.; the husband to have the custody of their child, William Emmett, etc. The question as to the effect of these articles of separation is brought upon the record by a formal bill of exceptions, and, as no question is raised as to the disposition of the case on a *certiorari*, we will consider it as the parties have presented it.

That a valid agreement may be made for separation between a husband and wife, and for an allowance for her support, where the separation is inevitable and immediate, is now too well settled to admit of discussion or require a citation of authorities. The validity of such covenants, although exceptional in their *status*, has been established by repeated decisions of this court. Ordinarily these agreements, as in Dillinger's Appeal, 35 Pa. St. 357, have been carried into effect through the medium of a trustee; but the undoubted weight of authority is that there may be a valid agreement for the separation directly between husband and wife, without the intervention of a trustee, which the courts

will sanction. *Hutton v. Hutton's Adm'r*, 3 Pa. St. 100; *Smith v. Knowles*, 2 Grant Cas. 418; *Hitner's Appeal*, 54 Pa. St. 110; *Garver v. Miller*, 16 Ohio St. 527; *Randall v. Randall*, 37 Mich. 563; *Dutton v. Dutton*, 30 Ind. 452. In such cases the husband himself will be treated as a trustee for the specific purpose in view, and will be held accordingly. If the object of the agreement is actual and immediate, if the terms are reasonable, and it is actually carried into effect by both parties in good faith, it will be as binding upon the wife as upon her husband. In the case at bar we do not understand that there is any allegation of fraud or unfairness, or that the terms of the deed of separation were, in any respect, unreasonable. How, then, under such circumstances, can the husband, upon the complaint of the wife, be convicted of a crime in failing to do what he was under no legal obligation to do? Can his wife, after having by a formal deed bound him to permit her to live separate and alone, and absolved him from her maintenance, immediately thereafter enter a criminal complaint, and procure his arrest and conviction, for doing what she had bound him both in law and in equity to do? The proceedings are not under the act of 1836, but under the act of 1867. They are instituted by the wife, not by the children or by the overseers of the poor; and it is difficult to see how the wife, in such case, could at the same time hold her husband to perform the articles and convict him of a crime for doing so. The absurdity of such a result is apparent. If the prosecution were in behalf of the children, or by the overseers of the poor, a question would be presented which it is not necessary now to discuss. Certainly a husband, as between himself and his wife, cannot be said to have separated himself from her without reasonable cause, when she has by deed placed him under legal obligation "not to visit her, or to enter any house where she may happen to be," and "to permit her to live separate from him," and to carry on business on her own account as if she were a *feme sole*. If a proper provision has been made for a wife, her husband is not liable even for necessaries furnished for her support, (*Cany v. Patton*, 2 Ashm. 140; *Alley v. Winn*, 184 Mass. 77;) and a party dealing with a married woman, known to be living apart from her husband, is put upon inquiry as to the cause of the separation. If this be so, for much stronger reasons will the husband, under such circumstances, be relieved from a criminal prosecution, instituted by the wife herself, to obtain an order for her maintenance. If the deed of separation was fraudulently procured and the terms were unreasonable, or if after its execution it had become null and void by the acts of the parties, these facts should have been shown; but, standing upon the deed alone, the conviction was unwarranted by the proofs, and must be set aside. The judgment is therefore reversed, and a *procedendo* awarded.

ASPINWALL et al. v. ASPINWALL.

(24 Atl. 926, 49 N. J. Eq. 302.)

Court of Errors and Appeals of New Jersey.
Aug. 8, 1892.

Appeal from court of chancery.

Bill by Florence S. Aspinwall against Sumner D. Aspinwall and others. From a decree for complainant, defendants appeal. Modified.

Samuel Kalish, for appellants. Cortlandt & Wayne Parker, for appellee.

BEASLEY, C. J. This bill has its footing in articles of agreement between a husband and wife providing for a separation. That instrument is exhibited by the complainant, and is to the effect following, to wit: That the husband will permit the wife during her life to live separate from him, and to carry on a separate business, and that he will not reclaim or molest her; and, further, that he will pay to her during her life, for the support of herself and her two children, of whom she is to have the custody, the sum of eight dollars per week. To the performance of these stipulations the husband binds himself to his said wife, and to her trustee, who is a party to articles, but who on his part does not enter into any covenant whatever. The agreements in favor of the husband made by the wife are that she will accept the designated weekly allowance "in full satisfaction for her support and maintenance, and for the support and maintenance of their said two children, and of all alimony during her coverture;" and that she will not prevent the children from visiting or being visited by their father at proper times. The prayer of the bill is that the husband shall be compelled to "specifically perform said articles of agreement, and especially that he do pay" the weekly sum stipulated for. The husband in his answer admits the separation and the execution of the articles, and in substance sets up, by way of defense, that the wife violated her agreement with respect to his intercourse with his children,—that she unreasonably hindered his and their intercourse. Upon these pleadings and the proofs taken, the decision was in favor of the complainant, and three things were decreed, namely: First, that the articles of separation should be specifically performed; second, that the moneys stipulated for should be paid by the husband for the use of the wife, together with her costs; and, third, that the husband should have the right to visit his children in a certain mode and at specified times.

With respect to the mandate that the moneys and costs in question should be paid for the use of the complainant, this court is of opinion that the decree before us should in all respects be affirmed. These stipulations for the support of the wife, who is living separate from her husband with his assent, have always been regarded as enforceable in a

court of equity in this state. This is plainly manifest from the decisions presently to be cited on another branch of our inquiry. And it would be singular, indeed, if the court should refuse to carry into effect stipulations of this character; for as there is nothing illegal in the fact of husband and wife living apart by mutual assent, and inasmuch as under such conditions the husband would be liable for the maintenance of the wife, it is difficult to see why equity should not enforce the payment of the sum of money that both parties have agreed to be a reasonable amount for that end. But it is not at all necessary either to labor or to elucidate the point, for the right to equitable relief by force of agreements of this character is regarded as res adjudicata. Nor do we think that the objection that, inasmuch as there is no covenant in these articles by the trustee for the benefit of the husband, therefore the stipulation to make the allowance to the wife is devoid of consideration, should prevail. It is no doubt usual in these cases for the trustee to covenant with the husband, to save him harmless from the debts contracted by the wife, and such covenants in some of the decisions have been referred to as the legal support of the husband's contract. But it seems plain that such a covenant would, as things are now circumstanced by the law of this state, be of no efficacy whatever. By force of our statutes, a married woman can contract in her own name, but her husband cannot be affected by such conduct, so that, when living by his assent in a state of separation from him, it does not seem possible for her to put him to trouble by reason of her debts. In this case the wife agreed to live separate from her husband, and while so living to accept a certain weekly sum wherewith to support herself and children; and that stipulation she has fulfilled, and the husband has received the benefit of such execution, and during the running of such contract has been absolved from all liability of the debts of his wife. In such a situation as this, an agreement on the part of the trustee to indemnify the husband in this particular would add, in substance, nothing to the security of the latter. We think the contract of this appellant to pay the moneys in question rested on a sufficient consideration, and that such contract, in this respect, is properly enforced in the decree before us.

As to that other part of this decree, which directs the articles of separation to be specifically performed, we think that so far forth it must be reversed. The doctrine that a court of equity will not aid to carry into effect an agreed separation between married persons has always been regarded as the law of this state. The doctrine was considered as settled law more than half a century ago, for, prior to the year 1831, Gov. Williamson, sitting as chancellor, dealing with this subject, in the case of Melony v. Melony, thus strongly expresses his conviction: "I am clearly of opinion that the agreement between parties to

live in a state of separation cannot be recognized in this court as valid, and that such agreement is a direct contravention of the marriage contract. It is contrary to sound policy, as well as morality, that the parties who have entered into the marriage state should be permitted to separate, and agree that they will live in a state of separation, and free from the obligations imposed on them by the marriage. The marriage contract cannot be annulled and canceled, nor the parties absolved from their obligations under it, by their private agreement." 1 N. J. Eq. 391. In the case of *Emery v. Neighbour*, 7 N. J. Law, 151, we find a similar expression of this equitable rule, which is reiterated in *Calame v. Calame*, 25 N. J. Eq. 552. The result is that, whatever may be the recent perturbations of opinion on this subject so remarkably exhibited by the English courts, we think that in this state the principle in question is so conclusively settled

as not to be open to discussion. Married persons may agree to live apart, and they may carry out such purpose; but the obligation to fulfill such contract is imperfect, for it will not be judicially enforced. The decree before us, therefore, must be reversed, so far as it directs these articles of separation to be in general specifically performed.

Nor can the third branch of this decree be sustained. It appoints the times and methods for the communication between the appellant and his children; but such affirmative relief cannot be given without a cross bill, or an answer in the nature of one. The pleadings do not raise the question thus decided, and consequently the decree, in this particular, is a mere interpolation. Let the decree of this court be entered in accordance with the foregoing views. The respondent is entitled to her costs, both in this appeal and in the court below.

LE BARRON v. LE BARRON.

(85 Vt. 365.)

Supreme Court of Vermont. General Term.
Montpelier. Nov., 1862.*Peck & Colby, for the petitioner. *366
O. H. Smith, for the defendant.

POLAND, C. J. This is a petition by the wife for a sentence of nullity of marriage, for the alleged physical impotence of the husband.

At the last stated session of the court in Washington county, the petitioner filed a motion for the appointment of a commissioner or referee, to inquire and report as to the allegation of the defendant's impotence, and that the defendant be required to answer interrogatories touching said allegation; and also to submit to a personal examination by medical men, under the superintendence and direction of such commissioner. So far as the motion prays that the defendant be compelled to answer interrogatories, or to be examined by physicians, the defendant resists it. This being the first time within our knowledge that an application of this character has been made in this state, and only three members of the court being present, it was deemed advisable to hold the matter under advisement until the present term, to obtain the opinion of the whole court.

The objection to the motion is based upon this ground: that the whole jurisdiction and power of the court over the subject of granting divorces and annulling marriages, is given by statute; that the court has no power except such as the statute confers; and that, as the statute does not give the court the power to require such an examination, therefore it does not possess it. If this be the true view of the jurisdiction and power of the court—that they can only exercise such powers as are expressly given by statute—then the objection of the defendant must be sustained, and the motion denied.

To enable us to determine this question, it becomes necessary to examine into the real source and extent of the jurisdiction of the court over this subject.

The legal power to annul marriages has been recognized as existing in England from a very early period, but its administration, instead of being committed to the common law courts, was exercised by their spiritual or ecclesiastical courts.

*367 Under the "administration of those courts, for a long period of time, the principles and practice governing this head of their jurisdiction, ripened into a settled course and body of jurisprudence, like that of the courts of chancery and admiralty, and constituted, with those systems, a part of the general law of the realm, and in the broad and enlarged use of the term, a part of the common law of the land, and was so held by the courts of that country.

This country having been settled by colonies from that, under the general authority of its government, and remaining for many years a part of its dominion, became and remained subject and entitled to the general laws of the government, and they

became equally the laws of this country, except as far as they were inapplicable to the new relation and condition of things. This we understand to be well settled, both by judicial decision and the authority of eminent law writers. But if this were not so, the adoption of the common law of England, by the legislature of the state, was an adoption of the whole body of the law of that country, (aside from their parliamentary legislation,) and included those principles of law administered by the courts of chancery and admiralty, and the ecclesiastical courts, (so far as the same were applicable to our local situation and circumstances, and not repugnant to our constitution and laws,) as well as that portion of their laws administered by the ordinary and common tribunals.

As the jurisdiction in England was exclusively committed to the spiritual courts, and had never been exercised by the ordinary law courts, the same could not be exercised by the courts of law in this country, until it was vested in them by the law-making power. As we have never had any ecclesiastical courts in this country, who could execute this branch of the law, it was in abeyance until some tribunal was properly clothed with jurisdiction over it, or rested in the legislature. It was probably on this ground that the legislatures of the states proceeded in granting divorces, as many of them did, in former times. When the legislature establish a tribunal to exercise this jurisdiction, or invest it in any of the already established courts, such tribunal becomes entitled, and it is their duty, to exercise it, according to *the general principles of the common law of the subject, and the practice of the English courts, so far as they are suited to our condition and the general spirit of our laws, or are modified or limited by our statute.

Such has been held to be the effect of a creation of a court of chancery, or giving equity jurisdiction, either total or partial, to a court of law, by the legislature. Such jurisdiction is to be exercised according to the general principles and practice of the chancery courts of the mother country.

In the state of New York, the legislature vested the jurisdiction to grant divorces and annul marriages in the court of chancery. In Williamson v. Williamson, 1 Johns. Ch. 488, Chancellor KENT said: "The general principles of English jurisprudence on this subject must be considered as applicable, under the regulation of the statute, to this newly acquired branch of equity jurisdiction, and the legislature intended, in granting the power of divorce, that those settled principles of law and equity on this subject, which may be considered a branch of the common law, should be here adopted and applied."

In Devanbagh v. Devanbagh, 5 Paige 554, which was a case very similar to this, and upon a similar application, Chancellor WALWORTH said: "When the legislature conferred this branch of its jurisdiction upon the court of chancery, it was not intended to adopt a different principle from that which had theretofore existed in England, and indeed in all Christian countries, as to the nature and extent of the physical

incapacity which would deprive one of the parties of the power to contract matrimony. And the court is, by necessary implication, armed with all the usual powers, which, in that country, from which our laws are principally derived, are deemed requisite to ascertain the fact of incapacity, and without which it would be impossible to exercise such jurisdiction." See also, on this subject, Bishop on Marriage and Divorce, chap. 2, §§ 18-28.

The uniform and settled practice in the ecclesiastical courts in England, in this class of cases, is to require a medical examination, and to compel the party to submit to it, if he will not do so voluntarily. *Norton v. Seton*, 1 Eng. Ecc. Rep. 394; *Briggs v. Morgan*, 1d. 408. In the last case, Lord STOWELL* states "369 the reason and foundation of the rule: "It has been said that the means resorted to for proof on these occasions, are offensive to natural modesty; but nature has provided no other means, and we must be under the necessity of saying that all relief shall be denied, or of applying the means within our power. The court must not sacrifice justice to notions of delicacy of its own."

The statute of New York, like ours, made impotence a ground for annulling a marriage, and, like ours, was wholly silent as to the power of the court to compel an examination, to furnish the proof of its existence. Yet it was held there to be clearly within the power of the court to require such examination, upon the ground that such being the settled practice in England, it had been adopted as the law here; and also, that it was a necessary means to enable the court to make effectual and operative the power given to annul marriages for such cause; *Devanbagh v. Devanbagh*, cited above; *Newell v. Newell*, 9 Paige 25. If these decisions in New York, are sound law, they are equally applicable here.

The power to grant divorces and annul marriages, has been by our legislature vested in the supreme court but no provision has been made by statute in relation to the mode of obtaining proof, or what proof shall be required. In thus conferring jurisdiction of this subject upon the court, it must be intended that all incidental powers necessary to make its exercise effectual, are also given, and that this is to be done in accordance with the principles and practice of the English courts, so far as applicable to the condition and circumstances of our people, and not contrary to any of our legislation, and the general spirit of our laws. Impotency, by our statute, is made a ground for annulling a marriage. Ordinarily, this is a matter which can not be proved by witnesses. The very nature of the fact precludes it, and if the court have no power to compel an examination, for the purpose of ascertaining the fact, it would in most cases amount to an absolute denial of justice, and that part of the statute making this a cause for nullifying a marriage, would be a dead letter.

Upon authority and reason, we are
*370 clearly satisfied that the "power exists in the court to compel such ex-

amination, although the statute does not provide for it.

As to the other branch of the application, that the defendant be required to answer interrogatories, we have much more doubt. We do not find that such was the practice in the spiritual courts in England; but that is explained, probably, upon the ground that the proceedings there are conducted more in the form of chancery suits, and the defendant puts in a sworn answer to the application for divorce or sentence of nullity. In New York, in the two cases cited, their courts ordered the defendant to answer interrogatories. It has already been decided in this state, that in divorce cases the parties can not be witnesses; hence, if in this case the petitioner were able to produce such proof as would establish what she claims, the defendant could not use his own testimony to controvert it. If, then, he is compelled to answer interrogatories, it is really enabling the petitioner to use his testimony when he could not; which does not seem just. The objection does not apply to compelling him to submit to an examination; because he could voluntarily be examined, and use the result as evidence for himself, if he chose.

We do not decide that the court have no power to compel the defendant to answer interrogatories, but we decline to make such an order in this case, at the present time.

The defendant, in support of his view—that the power of the court over the subject of divorces is wholly a statutory jurisdiction, and that therefore the court have no powers except such as are expressly conferred by statute—cites *Harrington v. Harrington*, 10 Vt. 505, and *Hazen v. Hazen*, 19 Vt. 608. They are both short notes of decisions in divorce cases. In the first, the defendant moved the court for temporary alimony, for her support during the pendency of the petition, and to enable her to defray the expenses of resisting it. The court said: "The statute gives this court, which in applications for divorces acts as a court of law, no power to grant alimony, except after divorce granted." *Hazen v. Hazen* was a like application to the court, and the court denied it, referring merely to their decision in *Harrington v. Harrington*. Neither of the cases appears to have been argued, or to have received any particular examination or "371 consideration by the court, and they were probably decided, as such motions usually are in such cases, from the bench, without either. They appear, however, to have proceeded upon the same idea of the jurisdiction and power of the court which the defendant maintains, which we have already attempted to show is erroneous. In the very matter of temporary alimony, no better illustration could be found to show the evil effect and unsoundness of the doctrine. In England, where the petition for divorce is by the husband, such application by the wife is universally granted, on showing a proper case of reasonable necessity for it. It is done upon this plain and reasonable ground, that the husband, having the entire control and

*possession not only of all his own property, but also of that of the wife, while the marriage subsists, and being liable by law to maintain and support the wife, the court will, when he appeals to their jurisdiction, require him to furnish her the means to live pending the litigation, if he have the ability to do so, and she be destitute; as otherwise she might suffer or starve. And upon the same principle, they will compel him to furnish her means to make her defence, as otherwise she might be denied justice. It is by no means beyond the range of reasonable supposition, that a man might force his wife to leave him, and then, by some false charge, supported by false testimony, attempt to procure a divorce; and if, in such case, she must be compelled to litigate with her husband the question of all others, the most important to her, without means to procure witnesses or employ counsel, or even to live, it is certainly a great reproach to our laws. We are glad to be able to say, that in our judgment they merit no such reproach.

In most of the states in our government, the courts have exercised the power of granting temporary alimony, even when their statutes do not provide for it, upon the ground that the power grows out of the very nature of the proceeding, and the necessity of the case, to prevent, in many cases, the grossest wrong and a failure of justice. Had the subject been examined and considered by the court, at the time the cases above named were de-

cided, we have no doubt an entirely different view would *have been *372 taken. In accordance with the views above expressed, temporary alimony was ordered in another cause at this term. In consequence of the novelty of this application in this state, we have given the subject more consideration than is usually given to cases of this character, and have thought it advisable to express the views of the court so much at length, as to have them understood.

It is ordered in this cause, that a commissioner be appointed to take the proofs in relation to the alleged incurable impotence of the defendant, at the time of the said marriage between him and the petitioner. And it is also ordered, that the defendant submit himself to a personal examination by such physicians and surgeons, at such time and place, and under such regulations, as shall be selected and prescribed by the said commissioner, for the purpose of determining the truth of the said allegation in said petition.

The commissioner will select such number of competent and disinterested physicians and surgeons, and prescribe such rules and regulations in relation to such examination, as to secure the utmost fairness of such examination, and will report all his proceedings in relation thereto, with the evidence of all such medical examiners as to the facts and results of said examination, and return the same, together with the other proofs taken by him, to the court.

EVANS v. EVANS et al.

(20 S. W. 605, 93 Ky. 510.)

Court of Appeals of Kentucky. Nov. 26, 1892.

Appeal from circuit court, Rockcastle county.

Suit by E. J. Evans against A. H. Evans and Lucinda Loving for divorce and alimony, on the grounds of abandonment and adultery. Judgment for plaintiff. Defendants appeal. Affirmed.

G. W. McClure and Wm. Lindsay, for appellant. W. O. Bradley and John W. Brown, for appellee.

HOLT, C. J. This case presents a sad domestic history. The appellee, E. J. Evans, on June 25, 1888, sued her husband, the appellant A. H. Evans, for a divorce a mensa et thoro and alimony. They had lived together for nearly 30 years, and had a numerous family of children. The ground of action, as stated in the petition, is the abandonment by the husband of the wife, without fault on her part, for a year next before the bringing of the suit, and his living in adultery during that time with the appellant Lucinda Loving, who was also made a defendant; it being alleged that the husband had caused his land to be conveyed to her without consideration, and in fraud of the rights of the wife. The answer of the appellant Loving merely says that she denies each averment of the petition relative to her. It, under section 128 of the Civil Code, which requires a specific denial, constitutes no answer whatever. That of the husband, however, sufficiently traverses the petition, and in a second paragraph he avers that the wife agreed with him in writing, on February 4, 1889, in consideration of \$300 paid to her by him, not to sue him for maintenance within one year. A demurrer was properly sustained to this part of the answer. By the common law every contract between husband and wife was void for want of parties. Articles of separation, with an adequate allowance to the wife for her support, made through the instrumentality of a trustee for her, have, however, been upheld; and generally if a contract between husband and wife, merely, be just and reasonable, and would be good at law when made by the husband with a trustee for the wife, it will be upheld in equity. It has been said by this court that while a contract made between them when living in amity for the payment of a certain sum by the husband to the wife, in view of a future separation, would be void as against public policy, yet this would not be so if made on account of previous separation, or in contemplation of immediate separation. Loud v. Loud, 4 Bush, 453. In other words, some contracts between them are enforced in equity, not because of the agreement merely, but because, the transaction being just and reasonable, the wife has no equi-

ty outside of it. Here the claim of the wife for alimony is met by the plea that she agreed, for a valuable consideration, not to sue for it for a year. Such a contract should not be upheld. It is in violation of public policy, it is inconsistent with the full course of justice, and it is not reasonable and just to the wife. The husband during the period covered by the contract might dispose of his entire estate. It would likely work a defeat of justice, and render the innocent and unoffending wife a pauper. It does not fully protect her rights, and should not therefore be enforced. Browne, Div. & Alim. p. 270. Seeking equity, however, she must of course render it, and she would therefore be chargeable with whatever she may have received under the contract. In this instance nothing was allowed her until a year had expired from the receipt by her of the \$300. More than six months after the filing of his answer, and when that length of time had expired after the pleadings in the case had been completed, the husband offered to file an amended answer, setting up adultery by the wife, and asking an absolute divorce from her. He presented with it an affidavit stating that when he filed his answer he knew the facts stated in the amended answer, but did not then know that he could prove them, and had only recently learned that he could do so. It seems probable, if he then knew his wife had committed adultery, that he would also have known by whom he could prove it; and, in view of the late day when the amendment was presented, and his knowledge of the matter stated in it when he filed his answer, we cannot, to say the least, hold that the chancellor in rejecting it abused that discretion which our practice gives him as to the filing of amended pleadings.

This court has no' revisory power over a judgment of divorce, but in determining whether alimony has been properly allowed it will enter into a consideration of the entire case. It is said that the averments of the petition are not proven; that it avers an abandonment for a year, while the evidence shows that the husband left the wife but about four months before the bringing of the action. An abandonment for a year, without fault upon the part of the complaining party, is ground, under our statute, for an absolute divorce; but this action is for one a mensa et thoro, and our statute provides: "Judgment for separation or divorce from bed and board may be rendered for any of the causes which allow divorce, or for such other cause as the court in its discretion may deem sufficient." The evidence, in our opinion, shows an abandonment by the husband for a year. It is true he continued to live at the same place where his wife resided until about four months before the institution of her suit, but the testimony shows that for a year or more he had refused to recognize her as his wife, or to live and cohabit with her. This amounted to an abandonment, although they

slept beneath the same roof. He says he left her because of her ungovernable temper, and abuse of him; but the quarrels evidently arose because of his attentions to his co-respondent. They tend strongly to show an improper intimacy between her and the husband. His conduct was of such a character as gave the wife just cause of complaint, and he is therefore the offending party. He was at least most certainly guilty of such conduct and abandonment as warranted the lower court, in the exercise of a sound legal discretion, in finding sufficient cause for a divorce from bed and board.

While the court did not allow the husband to set up the plea of adultery by the wife, yet the testimony relative to it is to be considered upon the question of alimony. The only evidence in this respect which we regard as worthy of any consideration is that of one witness, who testifies, in substance, that the wife offended with him. So far as this record shows, he was an entirely willing witness. He does not appear to have been attached and made to testify. It is not even shown that he was subpoenaed as a witness. He was entirely willing to not only destroy the wife, affix a stain to her children and family, but also to testify to conduct degrading to and highly blamable in himself. Such evidence is justly subject to suspicion. It comes in doubtful form. The lower court doubtless knew the parties, and he disregarded it. Under the circumstances, his conclusion upon this question of fact ought not to be disturbed. He granted the divorce from bed and board, allowed the wife an attorney's fee, which appears to be reasonable, and \$25 per month as alimony pendente lite after the expiration of the 12 months covered by the agreement between the parties; also \$500 as permanent alimony and subjected so much of the land as might be necessary to the payment of these sums. In view of the husband's circumstances and condition in life, these allowances of temporary and permanent alimony were reasonable. It is evident the conveyance of the land to Lucinda Loving was fraudulent. It was worth from \$2,000 to \$3,000. The year before its conveyance to her she gave in scarcely any property for taxation, while the next year her estate, considering her evident condition in life, grew amazingly. It is significant that she does not testify. The

deed to her was acknowledged March 2, 1890, but not recorded until nearly six months thereafter. Moreover, it appears a rule against the husband for failure to pay the pendente lite allowances and the case upon the merits were heard together. He was a witness in his own behalf, to purge himself of the contempt for failure to pay, and admitted that he paid over \$1,000 of the purchase money for the land.

The testimony as to the general reputation of the wife as to being high tempered was incompetent. The general reputation of either party for good or bad temper cannot be shown in a divorce suit. Browne, Div. & Alim. p. 126.

Complaint is also made because the testimony relative to the general reputation of the wife for unchastity was excluded. In civil actions, evidence of general reputation is not admissible, unless the proceeding be such as to put the character of the party directly in issue. The charge was adultery by her. She should not be convicted of such an act upon presumption. It was not a proceeding which put her general character in issue, and the admission of such evidence for the purpose of raising a presumption of her guilt would lead to more of uncertainty and disadvantage than benefit in the administration of justice. Humphrey v. Humphrey, 7 Conn. 116; Berdell v. Berdell, 80 Ill. 604; Washburn v. Washburn, 5 N. H. 195. No exception appears to have been taken, however, to the exclusion of this evidence, and error, if any, was therefore waived. Civil Code, § 589; Terrill v. Jennings, 1 Metc. (Ky.) 450. We have considered it because counsel have discussed it at length. An order of continuance in the case adjudges that "the costs of this case" shall be paid by the husband. An order of allowance of alimony pending the suit recites that it is to be paid to Mrs. Evans by "the plaintiff." It is evident that in both instances there was a clerical mistake. The meaning is plain. In the one case it was the cost of the continuance, and in the other it plainly meant that the husband was to pay the allowance. Besides, he was in fact liable for all the costs of the action, and the final judgment reads correctly as to the payment of the alimony. In our opinion, the court correctly found that the wife was the party offended against, and the judgment is affirmed.

NICHOLS v. NICHOLS.

(31 Vt. 328.)

Supreme Court of Vermont. Woodstock and Montpelier. Nov., 1858.

Libel for divorce from the bonds of matrimony. The cause for divorce was the alleged adultery of the libellee. The libellee, by her guardian *ad litem*, resisted the libel on the ground that she was insane at the time of the commission of the adulterous acts charged.

Heaton & Reed, for petitioner. Peck & Colby, for libellee.

REDFIELD, C. J. This is a libel for divorce *a vinculo*, for the adultery of the wife.

The defence was that she was insane

*331 "at the time. The court are satisfied

of the facts alleged, both in support and defence of the libel, and are not satisfied that the act complained of was done in a lucid interval.

The court held that general insanity is a full defence for all acts which by the statute are grounds of granting divorce. In regard to severity and desertion, there could be no question. There is wanting the consenting will, which is indispensable to give the acts the quality, either of severity or desertion. The case is the same in regard to acts of sexual intercourse with one not the husband. If done by force, or fraud, no one could pretend that it formed any ground of dissolving the bonds of matrimony. And insanity is even more an excuse, if possible, than either force or fraud. It not only is not the act of a responsible agent, but in some sense it might fairly be regarded as superinduced by the consent or connivance of the husband, since he has the right, and is bound in duty, to restrain the wife, when bereft of reason and the power of self control, from the commission of all unlawful acts, both to herself and others.

If the husband, knowing the wife's propensity to self destruction, suffered her to take her own life, he could be regarded as scarcely less than a murderer himself. So, too, in regard to the act complained of.

It was in the power of the husband always to guard against such consequences. And if he failed in this duty, he surely could not ask the court to visit the consequence of his own misconduct upon the unfortunate being, whom having sworn to love, comfort, honor and keep, in sickness and in health, till death, he had chosen to abandon to the short charity of a proverbially heartless world, in the hour of her utmost necessity.

And if the case were shown, of those to whose care the husband had prudently entrusted his wife, for care or for cure (as he might lawfully do,) having betrayed or abused this confidence to purposes of crime on their part, as might possibly occur without his fault, he surely could not blame his insane wife for the treachery of his own agents, or their assistants. In insanity it is well known that the subject is liable to such illusions as to mistake utter strangers for the nearest relatives. If, too, they retain only the ordinary stimulus of propensity, at such a time, with no power of self control, they are, of course, at the mercy *332 "of every base man. But in many cases sexual propensity is more or less excited during insanity, and the liability to such contingencies proportionally increased.

In such cases, for the husband to seek for a dissolution of the marriage relation, must argue great weakness or great depravity.

We have read the case of Matchin v. Matchin, 6 Barr 332, and the opinion of the late Chief Justice GIBSON, where he attempts to maintain that the adultery of the wife, although insane, is sufficient ground of divorce, for the reason that it tends to impose a spurious offspring upon the husband. The reason is one which will have no application to similar acts committed by the husband, and as applied to the wife, seems truly revolting to all just sense of propriety and decency. We are surprised that such an opinion should ever have found admission into the reports, and should be shocked at the prospect that it could ever gain general countenance in the American Republic.

A majority of the court are of opinion that the libel must be dismissed.

PILE v. PILE.

(22 S. W. 215, 94 Ky. 308.)

Court of Appeals of Kentucky. May 4, 1893.
Appeal from circuit court, Breckenridge county.

Action by Isaac Pile against Amanda Pile for divorce. From an order dismissing the petition, plaintiff appeals. Affirmed.

Morris Eskridge, for appellant.

PRYOR, J. The appellant filed his petition in equity, seeking a divorce from his wife on the ground of lunacy and an abandonment for five years, alleging that she is now confined in the lunatic asylum at Hopkinsville. He offers to surrender to the chancellor for the wife such part of his estate, real and personal, as may be deemed necessary for her support and maintenance, but wants an absolute divorce. It is stated in his petition that after their marriage they lived happily together for several years, when an unfortunate condition of her mind developed, and she is now, and was at the institution of the action, a confirmed lunatic, with no hope of recovery. The causes for a divorce are to be found in the statute only, and lunacy is not by express words, or by any reasonable implication, made one of the grounds for severing the marital relation. It is argued that this mental disease is such as to prevent the wife from discharging her

conjugal duties, and the husband from enjoying that intercourse with the wife resulting from the marriage relation. We cannot give such an enlarged meaning to the statute. Here the wife has a mind diseased without her fault. She lived happily with her husband for several years after the marriage, and discharged all the obligations and duties pertaining to the marriage relation. This relation is presumed to have been entered into by reason of the love and affection the two had for each other; and to adjudge that the misfortunes of this life, originating from causes over which neither have control, depriving the husband of the right of enjoying his baser passions, is a ground for divorce, would be placing mankind on a level with brute creation, and making the real virtues and happiness of married life subordinate to the enjoyment of mere animal propensities. This man, when he took the unfortunate woman to be his wife, vowed at the altar to love, cherish, and protect her in sickness and in health, and, whether the wife is diseased in mind or body, his marriage vow should and must be observed. The more helpless she becomes, the greater his duty to love and protect her. The wife has never abandoned the husband, but is now confined in the asylum for lunatics by his consent and direction. The chancellor did right in dismissing his petition.

Judgment affirmed.

ROBINSON v. ROBINSON.

(28 Atl. 362, 66 N. H. 600.)

Supreme Court of New Hampshire. Grafton.
July 31, 1891.Case reserved from Grafton county; before
Justice Smith.Libel for divorce by Fred A. Robinson
against Janette E. Robinson on the ground of
extreme cruelty, treatment seriously injuring
health, and treatment seriously endangering
reason. The case was reserved for the su-
preme court. Divorce decreed.

CARPENTER, J. The act of February 17, 1791, declared that "divorces may be decreed for the cause of extreme cruelty in either of the parties." Laws (Ed. 1830) 157. What constituted extreme cruelty was left to be determined by the ecclesiastical common law. "Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. They are high moral offenses in the marriage state, undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on the one side as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; or, if this cannot be done, both must suffer in silence. If it be complained that by this inactivity of the courts much injustice may be suffered, and much misery produced, the answer is that courts of justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no further. They cannot make men virtuous; and, as the happiness of the world depends on its virtue, there may be much unhappiness in it which human laws cannot undertake to remove. Still less is it cruelty where it wounds, not the natural feelings, but the acquired feelings, arising from particular rank and situation, for the court has no scale of sensibilities by which it can gauge the quantum of injury done and felt, and therefore the court will not absolutely exclude considerations of that sort when they are stated merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed. * * * The rule cited by Dr. Bever from Clarke and the other books of practice is a good general outline of the canon law, the law of this country, upon this subject. In the older cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court in the cases that have been mentioned; the court has never

been driven off this ground; it has always been jealous of the inconvenience of departing from it; and I have heard no one case cited in which the court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the court is not to wait until the hurt is actually done. But the apprehension must be reasonable; it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine, but still they are not cases for legal relief. People must relieve themselves as well as they can by prudent resistance,—by calling in the succors of religion and the consolations of friends; but the aid of courts is not to be resorted to in such cases with any effect." Evans v. Evans (decided in 1790) 1 Hagg. Consist. 35, 38-40. "There must be something which renders cohabitation unsafe, for there may be much unhappiness from unkind treatment and from violent and abusive language; but the court will not interfere; it must leave parties to the correction of their own judgment. They must bear as well as they can the consequences of their own choice. Words of menace are different. If they are likely to be carried into effect, the court is called on to prevent their being carried on to mischief." Harris v. Harris (1813) 2 Phillim. Ecc. 111. "To amount to cruelty, there must be personal violence or manifest danger of it; for unkindness, reproachful language on the one side, or vain and unfounded fear on the other, do not constitute any case of cruelty which the law can notice." Barlee v. Barlee (1822) 1 Addams, Ecc. 301, 306. "Legal cruelty is not established. Quarrels, and, if implicit credit can be given to the witnesses on the libel, much improper language by the husband passed, but there was no conduct to excite in the wife any reasonable apprehension of danger to her person." Kenrick v. Kenrick (1831) 4 Hagg. Ecc. 114, 129. "When there is a strong conviction in the mind of the court that the personal safety of the wife is in jeopardy, or where even it may see reasonable ground to apprehend such consequences, it is its bounden duty to protect the wife from risk and danger. In these suits the species of facts most generally adduced are—First, personal ill treatment, which is of different kinds, such as blows or bodily injury of any kind; secondly, threats of such a description as would reasonably excite in a mind of ordinary firmness a fear of personal injury. For causes less stringent than these the court has no power to interfere and separate husband and wife. * * * Short of personal violence or reasonable apprehension of it, I have no authority to interfere." Neeld v. Neeld (1831) Id. 263, 265, 271. To constitute cruelty, "there must be either actual violence committed, attended with danger to life, limb, or health, or there must be a reasonable apprehension of such violence. This I appre-

bend to be the substance of the doctrine laid down in *Evans v. Evans* and in other subsequent cases." *Lockwood v. Lockwood* (1839) 2 Curt. Ecc. 281, 283. In *Chesnutt v. Chesnutt* (1854) 1 Spinks, 196, one of the charges against the defendant was "that he used obscene and blasphemous language; was constantly intoxicated; thereby occasioned his wife great mental suffering and bodily ill health." The court (Dr. Lushington) say (pages 198, 199): "Here is no charge either of bodily violence inflicted, or of threats of personal ill treatment. However disgusting the use of the language charged, if proved, may be, however degrading habits of intoxication, however annoying to a wife, especially the wife of a gentleman and a clergyman, these facts, standing alone, do not constitute legal cruelty. If it be said that the consequences to the wife are mental suffering and bodily ill health, I do not think that the case would be carried further. The same might be said of other vices; of gaming, for instance; of gross extravagance, to the ruin of a wife and family,—all these might occasion great mental suffering, and, consequent thereon, bodily ill health to the wife; but they do not constitute legal cruelty. Such consequences, to be the subject of legal address, must emanate from bodily ill treatment or threats of the same. Such I apprehend to be the clear line of distinction drawn by all the authorities. * * * Mental anxiety, excitement, bodily illness, though occasioned to the wife by the conduct of the husband, do not constitute cruelty, except such conduct was accompanied with violence or threats of violence."

In *Barrere v. Barrere* (1819) 4 Johns. Ch. 187, 189, Kent, Ch., after reciting the facts, says: "There can be no doubt that these acts of bodily violence and harm amount to that cruelty against which the law intended to relieve. Mere petulance, rudeness, and sallies of passion might not be sufficient; but a series of acts of personal violence, or danger of life, limb, or health, have always been held sufficient ground for a separation by the canon law, which is the law of England upon this subject. Though a personal assault and battery, or a just apprehension of bodily hurt, may be ground for this species of divorce, yet it must be obvious to every man of reflection that much caution and discrimination ought to be used on this subject. The slightest assault or touch in anger would not surely, in ordinary cases, justify such a grave and momentous decision." The cruelty which entitles the injured party to a divorce consists in that kind of conduct which endangers the life or health of the complainant and renders cohabitation unsafe. If the charges in this bill are true; if this defendant permits her passions so far to usurp the throne of reason as to allow her to * * * commit personal violence upon her husband in his sleep; * * * to threaten his destruction by poison; and even to go so far as to procure a ready drug for that purpose,—not only his health, but even his life,

is in actual danger from her violence. *Perry v. Perry* (1831) 2 Paige, 501-503. "It is true that to constitute *scoevitia*, known to the civil law, * * * it is not necessary there should be an infliction of bodily injury or any act of personal violence committed. It is sufficient if there be a series of unkind treatment, accompanied by words of menace creating a reasonable apprehension that bodily injury may result to the wife unless prevented. * * * It [cruelty] must be actual personal violence, menaces, or threats, creating reasonable apprehension of bodily harm." *Mason v. Mason* (1831) 1 Edw. Ch. 278, 291, 292. The courts of Massachusetts hold substantially the same doctrine. *Hill v. Hill* (1806) 2 Mass. 150; *Warren v. Warren* (1807) 3 Mass. 321; *French v. French* (1808) 4 Mass. 587.

The question, what constitutes extreme cruelty? first came before this court in 1834, in *Harratt v. Harratt*, 7 N. H. 196. The evidence proved that the defendant had threatened to take the plaintiff's life, had treated her harshly and with neglect in sickness, and had ceased to provide for her support; it also tended to show a reasonable apprehension that cohabitation might subject the plaintiff to disease. The court, (Parker, J.) after citing with approval *Warren v. Warren*, *Evans v. Evans*, and some of the other foregoing cases, say: "That cruelty may be extreme, without blows, cannot be doubted; and we have no difficulty in holding that where the causes are grave and weighty, and such as to show an impossibility that the duties of the married life can be discharged, when violence is manifested, and there is reasonable apprehension of danger to life, limb, or health, the case comes within our statute, and that the court ought not to wait until the hurt is actually done. There has been more doubt whether the case before us, on the facts in evidence, comes clearly within the principle. The evidence, however, shows that the life of the libellant has been threatened, and we cannot say that there is no probability that violence will be resorted to; and, as there is further evidence of harsh treatment and neglect, and of circumstances tending to show that cohabitation would be attended with danger to the health of the libellant, the court is of the opinion that all these circumstances combined bring the case within the statute." In *Poor v. Poor* (decided in 1838) 8 N. H. 307, 315, 316, Richardson, C. J., says: "What, then, is extreme cruelty? It is not mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention, or even occasional sallies of temper, if there be no threat of bodily harm. * * * In the judgment of law, any wilful misconduct of the husband which endangers the life or health of the wife; which exposes her to bodily hazard and intolerable hardship, and renders cohabitation unsafe,—is extreme cruelty. And, in order to amount to such cruelty, it is not necessary that there should be many acts. Whenever force and violence, preceded by deliberate insult and abuse, have

been once wantonly and without provocation used, the wife can hardly be considered safe." To constitute extreme cruelty, direct bodily injury, actual or threatened, was essential. Threats of personal violence, unless of such a character as to create, "in a mind of ordinary firmness," a reasonable apprehension that they might be executed, were not legal cruelty. To the exceptionally sensitive and timid wife, put in actual and constant fear of limb or life by conduct not calculated to have that effect on a person of normal or ordinary sensibility, the law of divorce afforded no relief. The infliction of mere mental pain, however seriously it might injure health or endanger reason, was not legal cruelty. A husband might violate all the proprieties and decencies of social life; he might call "his virtuous wife a strumpet, saying so, not to herself alone, but before everybody;" although, "as far as suffering was concerned, he had better kick her." (Paterson v. Paterson, 3 H. L. Cas. 308, 313,) he might bring prostitutes into his family, and seat them at his table, make his house a brothel,—and the law, if it would justify the wife in leaving him, afforded her no other remedy. For such conduct as that described in W. v. W., 141 Mass. 495, 6 N. E. 541, and the injury caused to "her health by its effect upon her feelings," the wife was then in New Hampshire, as she is now in Massachusetts, remediless. Constant, innumerable, and nameless indignities of speech and action, each possibly petty in itself, might cause mental anguish less endurable, more hurtful to physical well being, and more likely to overturn reason, than any degree of pain produced by blows; they might make life intolerable, and death welcome; yet they were not legal cruelty. The sufferer's only remedy was "by prudent resistance," and "by calling in the succors of religion and the consolations of friends." In consideration of this state of the law, the legislature, in 1840, enacted that "divorces * * * shall be decreed, in favor of the innocent party, * * * when either party shall so treat the other as seriously to injure health or endanger reason." Laws 1840, c. 573, § 1. This provision in substantially the same language has ever since remained in force. Rev. St. c. 148, § 8. In the revision of 1867 it was verbally modified to read as follows: "A divorce * * * shall be decreed * * * (5) when either party has so treated the other as seriously to injure health; (6) when either party has so treated the other as seriously to endanger reason." Gen. St. c. 163, § 8; Gen. Laws, c. 182, § 3. The provision is to be construed in view of the mischief it sought to cure. It was intended to provide for a divorce of the parties in cases of the character referred to, when the conduct complained of did not fall within the established definition of extreme cruelty. It gave by legislation the relief which the English courts, pressed by the weight of the same considerations, have gone far to afford,—Paterson v. Paterson (1849) 3 H. L. Cas. 308, 318, 319, 325, 329; Kelly v.

Kelly (1869) L. R. 2 Prob. & Div. 31; Bish. Mar. & Div. (4th Ed.) § 722, note,—and which the courts of some jurisdictions, under like pressure, have afforded by a more liberal interpretation of the term "cruelty,"—Butler v. Butler, 1 Para. Eq. Cas. 329; Powelson v. Powelson, 22 Cal. 358; Latham v. Latham, 30 Grat. 307; Cole v. Cole, 23 Iowa, 433; Gholston v. Gholston, 31 Ga. 625; Palmer v. Palmer, 45 Mich. 150, 7 N. W. 780; Carpenter v. Carpenter, 30 Kan. 712, 2 Pac. 122; McMahan v. McMahan, 9 Or. 525; Kelly v. Kelly, 18 Nev. 49, 1 Pac. 194; Jones v. Jones, 80 Tex. 460. Whether one party has been so treated by the other as seriously to injure health or endanger reason is a pure question of fact. It cannot be declared, as matter of law, that any particular treatment may not have that effect. The gist of these causes of divorce is the injury to health and the danger to reason. Conduct which to a serious extent produces either, though not intended to have such a result, though it be "purely self-regarding," and not "directed towards" or "forced even upon the knowledge of" the other party, "otherwise than by the usual intimacy of matrimony," (W. v. W., 141 Mass. 495, 496, 6 N. E. 541,) is a cause of divorce. Any behavior of one party which affects the other physically or mentally is "treatment," within the meaning of the statute. A narrower sense cannot be given to the language used, without ignoring the extent of the evil to be cured, and depriving a large proportion of those who suffer from it of the protection the legislature intended to provide for them. The purpose of the legislature was to make the remedy co-extensive with the mischief. A malevolent motive in the party complained of need not be shown. Divorce is not punishment of the offender, but relief to the sufferer. Whether the behavior proved is a sufficient ground of divorce depends on the question whether it has seriously injured health or endangered reason. This is the sole test. The question is not whether the treatment reasonably ought or could reasonably be expected seriously to injure the health or endanger the reason of a person of ordinary intelligence and mental strength, but whether it has in fact had that effect upon the health or reason of the person complaining. A course of conduct which would drive one person crazy might have no effect on or even be grateful to another, and perhaps more sensible or less sensitive, person, but he or she whose reason is imperiled by it is not, therefore, to be compelled to endure the treatment. That the conduct complained of is in itself innocent, or even laudable, and is pursued from a sense of duty, does not afford a sufficient reason for requiring the party injured by it to submit to the destruction of health, reason, or life. The abstract reasonableness of the treatment, or its effect upon reasonable persons of ordinary firmness, does not enter into the question. If it did, the redress intended by the statute could not, in many cases, be obtained. The provision was designed for the benefit of the sensi-

tive, not excepting the abnormally sensitive, and not for the insensible and apathetic, whom nothing but blows can affect. It was intended to reach and provide relief in a class of cases where extreme cruelty, as defined by law, cannot be established; cases, among others, of slow and continuous mental torture, destructive of health or reason, and caused by conduct not necessarily wrongful, possibly even praiseworthy in itself, and made

a cause of divorce only because of its effect upon an abnormally sensitive mind. The case finds that the defendant's conduct as therein detailed has seriously injured the plaintiff's health, and the court cannot say that the finding is not warranted by the evidence. Jones v. Jones, 62 N. H. 463, 467. Divorce decreed.

SMITH, J., did not sit. The others concurred.

ELLIS et al. v. ELLIS.

(56 N. W. 1056, 55 Minn. 401.)

Supreme Court of Minnesota. Dec. 6, 1893.

Appeal from district court, Ramsey county; Otis, Judge.

On her petition therefor, Flora Ellis was appointed administratrix of the estate of Matthew Ellis, deceased, and from such order Rachel Ellis and others appealed to the district court. From an order affirming the appointment, appellants appeal. Affirmed.

F. G. Ingersoll and Chas. N. Bell, for appellants. M. L. Countryman and Stringer & Seymour, for respondent.

GILFILLAN, C. J. Appeal from an order appointing an administratrix. Stating the history of the matters involved in chronological order, in 1869 Matthew Ellis and Rachel Cottrell, then residents in Wisconsin, intermarried in that state, and resided therein—the latter part of the time at Hudson—from the time of their marriage till October, 1883, when they came to St. Paul, Minnesota. February 29, 1884, she commenced by proper personal service of summons an action against him for divorce in the circuit court for the county of St. Croix, (in which Hudson is situated,) in said state. Her complaint was sworn to by her, and it alleged, among other things, that she then was, and for more than three years last past had been, a resident of said county and state, and that for more than a year prior to bringing the action the defendant had willfully deserted and refused to live and cohabit with her; and it demanded judgment dissolving the marriage, and requiring the defendant to pay her the sum of \$8,000 alimony. The defendant filed an answer; not raising any substantial issues, and the parties made and filed a stipulation agreeing upon the alimony at \$6,150 and a horse, carriage, robes, etc., and all the defendant's household goods, except his library. The answer and stipulation suggest an agreement between the parties for a divorce,—a suggestion which ought to have caused the court, and we must assume that it did, to require strict and ample proofs of the facts showing a cause of action, and which would have been influential upon an application to vacate the judgment rendered on the ground of collusion and fraud upon the court. But that did not go to the jurisdiction of the court over the case. A reason for deciding against the plaintiff, or a fraud upon the court as to the judgment to be rendered, or the character of the motive that induced the bringing the action, does not affect the jurisdiction. March 27, 1884, judgment in that action was rendered, dissolving the marriage between the parties, and allowing the plaintiff therein the alimony stipulated; and that alimony was paid. September 2, 1886, Matthew Ellis and Flora Wilson intermarried, and they lived together as

husband and wife until December 7, 1892, when he died in St. Paul, Ramsey county, in this state. Flora Ellis, the second wife, filed a petition in the probate court of said county, stating the necessary jurisdictional facts, alleging that Matthew Ellis died intestate, and that she was his widow, and asking to be appointed his administratrix. On the day appointed for the hearing Rachel Ellis appeared, denied that Flora was the widow, alleged that she was the widow, and asked that she be appointed administratrix. At the same time appeared a brother and sister of deceased, representing that the deceased had made a will, still in force, and asking the court to make the proper order or decree in the premises. The probate court appointed Flora administratrix, and on an appeal to the district court, in which the court heard all the parties, that court affirmed the decision of the probate court.

Before taking up the principal question in the case, the only one which seems to us of sufficient importance, as presented by the evidence, to call for consideration at any length, we will dispose of others of less importance. It is claimed by appellants that the act of 1889 known as the "Probate Code" was not passed in the house of representatives in the manner prescribed by the constitution, because it does not appear from the house journal that the bill was read on three different days, or that the rule was suspended, as required by the constitution. It is not clear to us what the Probate Code has to do with the case, for the rule providing who shall be entitled to administration was the same under the prior law as under that act, and the evidence of a will offered was not sufficient to establish a will, not produced, either under the prior law or the Probate Code. Every bill signed and approved as required by the constitution is presumed to have been properly passed. And, as held in State v. Peterson, 38 Minn. 143, 36 N. W. 443, the absence from the journal of either house of an entry showing that a particular thing was done, is no evidence that it was not done, unless the constitution requires the entry to be made; and there is no such requirement in respect to the reading of a bill on three different days, or its passage under a suspension of the rule. The objection, therefore, is not well taken.

Ellis executed two wills,—one in 1890, which he destroyed, with intent to revoke, in July, 1891, when he executed another. He destroyed that will, apparently with intent to revoke it, December 31, 1891. The appellants offered evidence tending to prove that at that date he had not sufficient mental capacity to make or revoke a will. On the respondent's objection this evidence was excluded, on the ground, as we understand, that it was immaterial, because there was not sufficient evidence of the will. It must be apparent that, in order to defeat an application for the appointment of an admin-

istrator, proof of a will, not forthcoming, must be such as to show that it can be established. Proof that one was executed will not suffice without proof to a reasonable certainty of its contents. To establish a will without such proof would be to make a will for the party. The evidence afforded no means of determining with any degree of certainty what disposition the will of July, 1891, made of the testator's property. The most that could be made of it was that it left to Flora Ellis one-third of the property, and something more, but how much or what more did not appear; that there were specific devises or legacies to others, but to whom, except one, or how much to any one of them, did not appear; and that there was a residuary devisee or legatee, but who, did not appear; and there were no means of determining how much would be the residue. Of course, a will, not produced, could not be established on any such evidence, and evidence that the testator had not capacity to revoke it would be immaterial. That leaves only the question which of the two, Flora or Rachel, was the widow of Matthew Ellis? That depends on the validity of the judgment divorcing Rachel and Matthew. It is objected that the judgment was not sufficiently proved, because—First, the authentication was not in conformity with the act of congress; second, the copy authenticated is a copy of the judgment roll, and it does not appear the judgment was ever entered in the judgment book. When the proceedings of a court of another state are authenticated as provided by act of congress, they must be received as evidence; but it is competent for the legislature of each state to provide that proof of such proceedings may be received in the courts of such state by authentication less than is prescribed by act of congress, and the authentication in this case was in accordance with the statute of the state. We will assume that the laws of Wisconsin are the same as our own in respect to entering judgments and making up the judgment rolls. The roll, or an authenticated copy of it, is evidence of all that is properly contained in it, including the judgment, and is evidence, *prima facie* at any rate, that the judgment was properly rendered and entered, so as to have effect. It is objected to the judgment that by the laws of Wisconsin (which on this point were proved) the action for divorce is a local action,—that is, that it is properly triable in the county where the parties, or one of them, resides; that by the pleadings it appears that the only county in which either party resided was the county of St. Croix, but that the hearing in the action was had in the county of Eau Claire. And it is urged that in hearing the case the court acted without jurisdiction. We are not referred to any decision in that state as to the effect on the jurisdiction of a trial (by the same court) in one county when the statute provides that the trial ought to be in another.

In this state it might be an irregularity, and, if objected to, error, but would not affect the jurisdiction of the court so as to render the judgment void. *Gill v. Bradley*, 21 Minn. 15; *Kipp v. Cook*, 46 Minn. 535, 49 N. W. 257; *Tullis v. Brawley*, 8 Minn. 277, (Gil. 191.) And we assume that the rule is the same in Wisconsin.

The appellants offered, in order to impeach and avoid the judgment, to prove that Rachel Ellis was compelled to bring the action by the defendant's course of conduct towards her, which consisted in endeavoring to persuade her to bring the action; that during the period of two years he abandoned her at different times, at first for a week at a time, gradually lengthening the periods of absence until they became three months at a time, leaving her unprovided with the necessaries of life, and threatening, whenever he returned, that he would continue that course of conduct unless she consented to bring the action, and that unless she so consented he would run away, and leave her without a penny; and also to prove other acts of his of a similar character, all of which had such effect upon nerves and health and mental condition that she was not a free agent, in which condition she brought the action; from all which it is claimed she brought it under duress. Whether at any time, and especially whether after she has received and enjoyed the fruits of the action, and has acquiesced for years, until the defendant has married again, and has died, and there is left solely the matter of distributing his property, a woman plaintiff could, because of such facts, obtain any relief in the same action, we will not undertake to say. Certainly it would be no ground for assailing the judgment in a collateral proceeding at any time. In the majority of actions for divorce by wives on the ground of desertion or ill usage, the same claim of duress to bring the action might be made as in this case, and the stronger the grounds for divorce the stronger would be the ground to avoid the judgment whenever it might be convenient or profitable to do so. The court properly excluded the evidence.

The principal question in the case was presented by the appellants' offer to prove, and the ruling of the court excluding the evidence, that at the time of bringing the action in Wisconsin and of the divorce decree neither of the parties to it was a resident of that state, but that both were residents of this state. It is claimed for the evidence that, if admitted, it would have shown that the Wisconsin court had no jurisdiction of the subject-matter of the action, to wit, the marital relation between the parties; that consequently the decree was void; Rachel remained the wife, and is now the widow, of Matthew; and that the marriage with Flora was void. The question thus raised is of great importance, and difficult to satisfactorily determine. It

is an undisputable general proposition that the tribunals of a country have jurisdiction over a cause of divorce, wherever the offense may have occurred, if neither of the parties have an actual, bona fide domicile within its territory. This necessarily results from the right of every nation or state to determine the status of its own domiciled citizens or subjects without interference of foreign tribunals in a matter with which they have no concern. But when in the court of a state an action for divorce is brought, and a decree of divorce rendered, the court is presumed to have determined the facts essential to its jurisdiction, among them the residence of the parties. When, as between whom, and to what extent is such determination binding in the state in which the parties are in fact residents? The cases in which the question may arise may be divided into three classes: First, in proceedings between the state of the parties' actual residence and one of the parties; second, in proceedings between the parties in the state of their actual residence, where the divorce in the other state was procured on the application of one of them, the other not appearing in the action to procure it; third, in proceedings between the parties when both voluntarily appeared in the action in which the divorce was granted, and consented to the jurisdiction, or that the court might determine the facts on which the jurisdiction depended. In the second class of cases, since it was settled that a judgment of another state can be assailed on the ground of want of jurisdiction in the court to render it, the decisions have been practically uniform that the party who did not submit to the jurisdiction is not bound by the judgment. Of the decisions in cases coming under the first class we refer to four,—*Hood v. State*, 58 Ind. 263; *Van Fossen v. State*, 37 Ohio St. 317; *People v. Dawell*, 25 Mich. 247; and *State v. Armington*, 25 Minn. 29,—all cases between the state of actual residence and one of the parties. In the first of these the record of the judgment showed that neither of the parties was a resident of Utah, where it was rendered, so that the record impeached itself. It was, of course, held that the judgment was void. In each of the others it was held that, in order to show want of jurisdiction in the court rendering the judgment, it might be shown that neither of the parties resided within the state in which it was rendered, and, that being shown, it was void. In the opinion in each case language is used apparently sustaining the proposition that such would be the rule however the question of the validity of the judgment might arise. In *People v. Dawell*, Mr. Justice Cooley delivered the prevailing opinion, Mr. Chief Justice Christiancy concurring, and Mr. Justice Campbell dissenting. It was enough for the purpose of that case to decide whether the judgment was valid as against the state

of residence. Whether it was valid as between the parties was not before the court; and such was the case in *Hood v. State* and *State v. Armington*. So far as the state of residence is concerned, it must be taken upon the authorities, and certainly in this state, upon the *Armington Case*, that it is not bound by a judgment divorcing two of its resident citizens, rendered by a court of another state. There are reasons why it should not be bound, however it may be between the parties which we will presently refer to.

It does not follow that the judgment is void in the third class of cases. A judgment operating on a res may be binding between the parties to the action without binding one not a party, but interested in the res. In an action for divorce the res upon which the judgment operates is the status of the parties. There are three parties interested in that,—the husband, the wife, and the state of their residence. This was in the mind of Mr. Justice Cooley in writing the opinion in the *Dawell Case*. He said: "But it is said if the parties appear in the case the question of jurisdiction is precluded. That might be so if the matter of divorce was one of private concern exclusively." "As the laws now are, there are three parties to every divorce proceeding,—the husband, the wife, and the state; the first two parties representing their respective interests as individuals; the state concerned to guard the morals of its citizens, by taking care that neither by collusion nor otherwise shall divorce be allowed under such circumstances as to reduce marriage to a mere temporary arrangement of conscience or passion." "Such being the case, suppose we admit that the parties may be bound by their voluntary appearance in the foreign jurisdiction. How does that affect the present case? How, and in what manner, did the Indiana court obtain jurisdiction of the third party entitled to be heard in this proceeding; that is to say, of the state of Michigan?" This line of reasoning was applied by the same court in *Waldo v. Waldo*, 52 Mich. 94, 17 N. W. 710. One question in that case was whether the plaintiff was the widow of Jerome B. Waldo, just as in this it is whether Flora Ellis is the widow of Matthew. Previous to her marriage to Jerome B. she had been married to one Carey, from whom she had obtained a divorce in Indiana, both parties appearing in the action for it. The court held the judgment could not be assailed by showing want of residence in Indiana and residence in Michigan, saying in one part of the opinion: "This state has never complained of that judgment, and neither party has objected to it." The *Dawell Case* was not referred to, and we may from both cases take the rule in that state to be that, while the state cannot be bound by its resident citizens appearing in and consenting to the jurisdiction of a court in another state

in an action for divorce, the parties may so bind themselves in respect to their individual interests. In *Kinnier v. Kinnier*, 45 N. Y. 535, a private action, it was held that a judgment of divorce by the court of another state, both parties appearing in the action, could not be assailed on the question of residence. In the course of the opinion the court, Church, C. J., said: "Nor can I assent to the reason given for allowing the husband to repudiate the binding force of the judgment upon him, after voluntarily submitting himself to the jurisdiction of the court, and litigating the case upon its merits;" thus recognizing the effect of the voluntary submission upon the parties' right to question the judgment. Cases in Massachusetts, to which we are cited by appellants, are hardly of authority on the point, because the decisions were based mainly on a statute of that state. *Ellis v. White*, 61 Iowa, 644, 17 N. W. 28, has only bearing on one phase of this case. It was there held that a plaintiff in an action for divorce and alimony cannot question the jurisdiction of the court after accepting the benefits of the judgment.

It may seem anomalous that a judgment of divorce can be so far effectual between the parties as to extinguish all rights of property dependent on the marriage relation,

without being effectual to protect them from accountability to the state for their subsequent acts. One reason why they ought not to be permitted, by going into another state and procuring a divorce, to escape accountability to the laws of their state, is that their act is a fraud upon the state, and an attempt to evade its laws, to which it in no wise consents, and it may therefore complain. But the parties do consent, and why should they be heard to complain of the consequences to them of what they have done? Why should they be permitted to escape those consequences by saying: "It is true that by a false oath made by one of us, and connived at by the other, we committed a fraud in the Wisconsin court, and induced it to take cognizance of the case; but now we ask to avoid its judgment by proof of our fraud and perjury or subornation of perjury." Because we do not think it can be done the parties must, so far as their individual interests are concerned, abide by the judgment they procured that court to render; and, of course, what will bind them will bind those who claim through them, or either of them, which is the case with the appellants other than Rachel. There were other minor questions raised by the assignments of error, but we do not see any merit in any of them. Order affirmed.

WILSON v. WILSON.

(28 N. E. 167, 154 Mass. 194.)

Supreme Judicial Court of Massachusetts. Suffolk. June 27, 1891.

Report from superior court, Suffolk county; John Lathrop, Judge.

E. J. Jenkins and W. B. Orcutt, for libellant. J. G. Holt, for libellee.

MORTON, J. This case turns on the question whether the finding of the court was correct that the libellant was, upon the evidence, guilty of connivance. The libellant did nothing to encourage his wife to commit adultery, and did not, directly nor indirectly, throw opportunities in her way. Until the day he detected her, the report does not show that any unusual or improper acts had occurred in his presence between her and any other man. He had suspected and had watched her, but had not obtained proof of her guilt, and had not, till the day he caught her, had the assistance of a detective or police officer. On that day he came from his home in Dorchester, and waited, suspecting she might come to Boston also, and might leave the Dorchester car at the corner of Federal and Beach streets, which she did. She met a man by the name of Andrews, whom there is nothing to show the libellant had ever seen or heard of before, and went with him to the hotel. The libellant followed her, and, after waiting in the hotel an hour, and listening 10 or 15 minutes at the door of the room where they were, burst it open, and found them in bed together. He hoped she would commit adultery, so that he could get a divorce, and gave her plenty of time, and did not warn her so that she might not do it. He thought before this that she had committed adultery. We think, as matter of law, it cannot be said on this state of facts that the libellant was guilty of connivance. It is true that he could have prevented his wife from committing adultery, and did not. On the contrary, he wished she would, that he might have evidence on which he could get a divorce. But he did not make or aid in any way in making the opportunity. He did no overt act, unless keeping still was one, which it clearly was not. It was not a case where he supposed his wife was about to commit adultery for the first time, and where it would have been his duty to have given her the assistance which husband and wife are mutually expected to give to each other. It certainly cannot be held that a husband who suspects his wife of infidelity can take no means to ascertain the truth of his suspicions without being deemed guilty of connivance. "There is a manifest distinction," says the court in Robbins v. Robbins, 140 Mass. 531, 5 N. E. 837, "between the desire and intent of a husband that his wife, whom he believes to be chaste, should commit adultery, and his desire and intent to obtain evidence against his wife, whom he believes already to have committed adultery, and to persist in her adulterous

practices whenever she has opportunity." Merely suffering, in a single case, a wife, whom he already suspects of having been guilty of adultery, to avail herself to the full extent of an opportunity to indulge her adulterous disposition, which she has arranged without his knowledge, does not constitute connivance on the part of the husband, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. He may properly watch his wife, whom he suspects of adultery, in order to obtain proof of that fact. He may do it with the hope and purpose of getting a divorce, if he obtains sufficient evidence. He must not, however, make opportunities for her, though he may leave her free to follow opportunities which she has herself made. He is not obliged to throw obstacles in her way, but he must not smooth her path to the adulterous bed. 2 Bish. Mar. & Div. (5th Ed.) § 9; Timmings v. Timmings, 3 Hagg. Ecc. 76; Stone v. Stone, 1 Rob. Ecc. 99-101; Phillips v. Phillips, 10 Jur. 829. The law does not compel a husband to remain always bound to a wife whom he suspects, and it allows him, as it does other parties who think they are being wronged, reasonable scope in their efforts to discover whether the suspected party is or is not guilty, without themselves being adjudged guilty of conniving at the crime which they are seeking to detect. Robbins v. Robbins, *supra*. In a libel for divorce for desertion, the willingness, or even the desire, of the deserted party to be deserted, so long as it is not expressed in conduct or acts to the other party, will not bar a divorce. Ford v. Ford, 143 Mass. 577, 10 N. E. 474. Of course, as the court says in that case, there is always the difficulty of believing that the desire or willingness did not manifest itself in conduct or acts expressive of it to the other party. But nothing of the sort appears here. In St. Paul v. St. Paul, L. R. 1 Prob. & Div. 739, the court held that the neglect of the husband which would justify the court in withholding a decree in his favor, under a statute which provided that the court might do so where the husband was guilty of "such willful neglect or misconduct as * * * conduced to the adultery," must be such neglect as conduced to his wife's fall, and not neglect concurring to any particular act of adultery subsequent to her fall. The case of Morrison v. Morrison, 136 Mass. 810, referred to by the libellee, differs from this. In that case the husband, after he had been cautioned to watch his wife, made opportunities for her and her suspected paramour to be together alone, witnessed without objection acts of considerable familiarity between them, said nothing whatever to his wife intimating any disapproval of her conduct, and in other ways acted in such a manner as to induce the adultery for which he was watching. In the opinion of the court there must, therefore, according to the reservation of the report, be a new trial granted, and it is so ordered.

CLAGUE v. CLAGUE.

(49 N. W. 198, 46 Minn. 481.)

Supreme Court of Minnesota. July 1, 1891.

Appeal from district court, Hennepin county; Hooker, Judge.

Davis & Farnham, for appellant. Hodgson & Schaller and Shaw & Gray, for respondent.

DICKINSON, J. This is an action for a divorce on the ground of cruelty. The decision of the court in favor of the defendant was based upon the fact that, subsequent to the acts of cruelty which the evidence tended to establish, the plaintiff, after having been for about 10 months absent from the defendant, voluntarily resumed cohabitation with him, and thereby condoned the previous conduct complained of. We are of the opinion that the case justified this conclusion, and it will not be necessary to here refer to the evidence relating to the defendant's former conduct, nor to the refusal of the court to receive certain evidence offered to show his misconduct. It is well established that the doctrine of condonation is applicable not alone to adultery, but as well to cruelty in the marriage relation (2 Bish. Mar. & Div. §§ 49, 50; Gardner v. Gardner, 2 Gray, 434; Sullivan v. Sullivan, 34 Ind. 368; Phillips v. Phillips, 27 Wis. 252, and cases cited); and it may be implied from a voluntary resumption of discontinued cohabitation, although it is true, as a general proposition, that an inference of forgiveness is not to be so readily made against a wife as against a husband. The circumstances under which the renewal of conjugal relations was effected are to be considered with discrimination, with the view of determining whether it was with her free consent, in which case an

intention to overlook the past misconduct may be inferred, or whether, on the contrary, she was induced by deception, by considerations of supposed necessity, or by other influences which deprived her conduct of the essential quality of free consent. Concerning the circumstances of this case, we will only state that after a separation of nearly a year it came about that the parties were occupying separate rooms at a hotel in Minneapolis, to which place the defendant came on business from a distant army post, he being an officer in the army of the United States, and that at length, by consent of the plaintiff, they resumed conjugal relations, and continued to occupy the same room for several days, until the defendant returned to his post. They never afterwards lived together. No acts of cruelty followed this renewal of marital relations. The evidence tended also to show that afterwards, the defendant having been ordered to a post in an Eastern city, the plaintiff intended to go there and to reside with him. During the prior separation of the parties the defendant had made provision for the plaintiff's support, and the court was justified in concluding that her resumption of cohabitation was not induced by any actual or supposed necessity. While there was evidence on her part that it was under a promise to make a transfer of property to her, which promise he did not fully perform, that was controverted by him, he testifying that there was no other inducement than such as arose from their marriage relation. We see no reason to overrule the determination of the court as to the fact. It is said that the defense of condonation was not pleaded by the defendant. It is enough, however, that, although not pleaded, it was tried as a contested fact without objection. Order affirmed.

POLSON v. POLSON.

(89 N. E. 498, 140 Ind. 810.)

Supreme Court of Indiana. Jan. 15, 1895.

Appeal from superior court, Allen county; C. M. Dawson, Judge.

Action by Margaret Polson against John Polson. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Samuel M. Hench, for appellant. Mr. Bittinger, for appellee.

HOWARD, J. The appellee was granted a divorce from the appellant. The complaint is attacked here for the first time. It is first contended that it does not appear from the complaint that at the time of the filing of the same the appellee was and had been for two years previous thereto a bona fide resident of the state, or that she was then, and had been for six months immediately prior thereto, a bona fide resident of Allen county. The allegations as to residence were as follows: "That the plaintiff is now, and has been for more than two years last past, a bona fide resident of the state of Indiana, and for more than six months last past a bona fide resident of the county of Allen." This seems sufficient, under the statute, and counsel has pointed out no reason why it should not be so considered.

It is alleged in the complaint that on the 18th day of June, 1892, in the Allen circuit court, the appellant "was convicted of the crime of rape upon a little girl, the daughter of plaintiff." Counsel insists that this is insufficient, as it is not alleged that the crime was infamous. It would seem that the infamy were sufficiently apparent. Webster gives, as the synonyms of "infamous," "detestable, odious, scandalous, disgraceful, base, vile, shameful, ignominious"—all of which epithets might properly be applied to the crime of rape upon a little girl by her own stepfather.

The seventh cause for a divorce, as set out in section 1044, Rev. St. 1894 (section 1032, Rev. St. 1881), is: "The conviction, subsequent to the marriage, in any country, of either party, of an infamous crime." While the allegation might well have been made in words of the statute, yet even the statute itself requires that, "in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed." Section 379, Rev. St. 1894 (section 376, Rev. St. 1881). Even in criminal procedure, the words of the statute need not be strictly pursued. Section 1806, Rev. St. 1894 (section 1737, Rev. St. 1881). It is very clear that rape is an infamous crime. The meaning of the allegation in this case was even more evident than if the general words of the statute had been used, and the appellant did not thereby suffer any harm; he was not left in doubt as to the charge made against him. But, even if the allegation as to rape were insufficient, the complaint also

charges that the appellant, in "December, 1891, and various times before and after said date," committed adultery with the daughter of the appellee. The complaint was sufficient.

In arguing that the evidence does not support the finding, as also in discussing the sufficiency of the complaint, counsel contends "that the party who desires to obtain a divorce on the ground that the other party has been convicted of an infamous crime has no right, under the laws of this state, to commence the action until the year has expired giving the convicted party the right to appeal." As this action was begun within less than a year from the alleged conviction of appellant, it is therefore plausibly argued that the evidence given in this case showing that appellant was confined in the penitentiary is not sufficient to prove that he had been convicted of an infamous crime, inasmuch as he might within the year appeal, have the sentence against him reversed, and so establish his innocence. The position here assumed by counsel seems a novel one. He has cited no authorities to support him. Moreover, it does not appear that the question was brought to the attention of the court below. However that may be, there could be no reversal of the judgment in this case, for the reason thus urged by counsel. The complaint, as we have seen, charged adultery, and that offense was fully proved. Whatever the reason, therefore, why appellant was in the state prison, or whether he was rightfully convicted of an infamous crime, can make no difference here. Sufficient other statutory cause for divorce was alleged in the complaint, and proved on the trial.

Counsel finally contends that the evidence shows condonation by the appellee of the acts of adultery charged and proved against appellant. We have carefully read the evidence on this point, and are of opinion that there is evidence sufficient to support the finding of the court that there was no condonation. "Condonation," as quoted by counsel from Campbell v. Campbell, 3 Jur. (N. S.) 848, "is connubial intercourse, with full knowledge of all the facts." While appellee undoubtedly had some knowledge of her husband's offense before she separated from him, yet she did not have full knowledge of all the facts. She says: "It was only hearsay. I didn't know it to be the truth, for I didn't think it of him." That she retained confidence in her husband, and refused to condemn him on the first report of his guilt, ought not to be treasured up against her. She says: "I didn't know it. I didn't think it of him." That she became convinced the next day, and had him at once arrested, rather corroborates her than otherwise. "Condonation," says Mr. Bishop, "is not so easily inferred, and is not so strict a bar against the wife as against the husband. She has not the same control over her husband that he has over her. She may find a difficulty in

separating herself from him. She may submit to necessity. It is too hard to term such submission mere hypocrisy." 2 Bish. Mar. &

Div. § 284. We think the case was fairly heard and decided according to the evidence. The judgment is affirmed.

MATHEWSON v. MATHEWSON.

(28 Atl. 801, 18 R. I. 456.)

Supreme Court of Rhode Island. Jan. 23, 1894.

Petition by Sophronia W. Mathewson against Luther W. Mathewson for divorce from bed and board, and separate maintenance. Dismissed.

Stephen O. Edwards, for petitioner. Nathan W. Littlefield and Walter R. Stiness, for respondent.

TILLINGHAST, J. This is a petition for divorce from bed and board, and for separate maintenance, on the grounds of desertion, neglect to support, and adultery. The parties were married October 2, 1853, and lived together until 1861, when the respondent deserted the petitioner, telling her he was going away on business, and entered the service of the United States, as a soldier. He wrote to her once or twice shortly after leaving, after which she heard nothing from him, directly, for 27 years, but it was commonly reported that he was killed in the army during the late Civil War; and the petitioner, supposing that he was dead, remarried in 1872 to one James M. Place, with whom she lived as his wife until August, 1892. About five years ago the respondent returned with another wife and several children, and the petitioner became aware of this act as early as January, 1890, when she saw him, and had a talk with him. She also saw and consulted with an attorney of this court as to her relations with said Place about two years ago, shortly after which she ceased to cohabit with him, and filed this petition for divorce. In this state of the proof, the respondent's counsel contends that the divorce should not be granted, as it appears that the petitioner was herself guilty of adultery, or at any rate of such gross misconduct and wickedness, repugnant to, and in violation of, the marriage covenant under which she is now seeking relief, as to bar her from asserting any claim against her husband.

The petitioner was perhaps justifiable in contracting said second marriage, her hus-

band being presumptively dead, and as she believed, and had reason to believe, dead in fact. As soon as it came to her knowledge, however, that he was living, if she intended to claim her conjugal rights, she should have immediately ceased cohabitation with her second husband; her marriage with him not being voidable merely, but absolutely void. Pub. St. R. I. c. 163, § 5.¹ She was only justified, therefore, in living with Place during the continuance of her belief that the respondent was dead. By continuing to live with him after the return of the respondent, she certainly forfeited all legal claim to the support of the latter if, indeed, she did not thereby commit the crime of adultery (1 Bish. Mar. Div. & Sep. § 1511); and hence is in no position to complain of the wrongs committed by him. She alleges, as does every petitioner for divorce, that, ever since her marriage with the respondent, she has, "on her part, demeaned herself as a faithful wife, and performed all the obligations of the marriage covenant," while her own testimony shows that she has grossly violated the same, and therefore that she does not come into court with clean hands, as the law requires. But, on the other hand, the proof shows that, had the respondent been himself free from legal fault at the time of the commencement of this suit, he would have had a good and sufficient ground for divorce against the petitioner. It appearing, then, that the petitioner, whether equally guilty with the respondent or not, has been guilty of conduct which would be a sufficient ground for divorce, she is not entitled to the relief prayed for in her petition. 5 Am. & Eng. Enc. Law, 824, and cases cited in note 10; Church v. Church, 16 R. I. 667, 19 Atl. 244; 2 Bish. Mar. Div. & Sep. § 849; Browne, Div. & Allim. 84. For circumstances that would excuse cohabitation with a second husband while the first marriage was still subsisting, see Pratt v. Pratt, 157 Mass. 503, 32 N. E. 747. Petition denied and dismissed.

¹ Pub. St. c. 163, § 5: "All marriages when either of the parties have a former wife or husband living at the time of such marriage, or where either of them shall be an idiot or lunatic at the time of such marriage, shall be absolutely void."

COPE v. COPE.

(11 Sup. Ct. 222, 137 U. S. 682.)

Supreme Court of United States. Jan. 19, 1891.

Appeal from the supreme court of the territory of Utah.

This was an appeal from a decree of distribution, originally pronounced by the probate court of Salt Lake county, affirmed by the district court of the Third judicial district of Utah, and again by an equal division of the supreme court of the territory. The sole question presented for consideration was, whether George H. Cope, the illegitimate child of Thomas Cope, was, under the facts of the case, the heir of Thomas Cope, deceased. The finding of facts, so far as the same are material, was as follows: (1) That Thomas Cope, deceased, died at Salt Lake county, Utah territory, intestate, on the _____ day of August, 1864, leaving certain real estate therein, the description of which is immaterial; (2) that said Thomas Cope left at the time of his death, surviving him, Janet Cope, his lawful wife, Thomas H. Cope, his only legitimate son, and George H. Cope, his illegitimate son by Margaret Cope, his polygamous or plural wife, and that the marriage of the said deceased with Margaret Cope was contracted while the said Janet Cope was the living and undivorced wife of said deceased. And as conclusions of law the court found (1) that the sole heirs at law of said Thomas Cope, deceased, are Janet Cope and Thomas H. Cope, who are alone entitled to share in the distribution of the estate of said Thomas Cope, and that all the real estate above mentioned descended to, and vested in, said Janet Cope and Thomas H. Cope, subject to the administration upon such estate; (2) that the said George H. Cope is not an heir of said Thomas Cope, deceased, and not entitled to any share of said Thomas Cope's estate.

J. G. Sutherland, for appellant. R. N. Basquin, for appellee.

Mr. Justice BROWN, after stating the facts as above, delivered the opinion of the court.

The appellant, George H. Cope, who is admitted to be the illegitimate child of Thomas Cope, by Margaret Cope, his polygamous wife, claims the right to inherit a share of his father's estate under a territorial statute of Utah, enacted in 1852, which provided as follows: "Sec. 25. Illegitimate children and their mothers inherit in like manner [as legitimate] from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children." While this statute is an innovation upon the common law, and in some particulars a novelty in legislation, we perceive no objection to its validity. By section 6 of the act of September 9, 1850 (9 Stat. 453), establishing a territorial government for Utah, it is provided: "That the legislative power of

said territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States, and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents. All the laws passed by the legislative assembly and governor shall be submitted to the congress of the United States, and, if disapproved, shall be null and of no effect." With the exceptions noted in this section, the power of the territorial legislature was apparently as plenary as that of the legislature of a state. *Maynard v. Hill*, 125 U. S. 204, 8 Sup. Ct. 723. The distribution of and the right of succession to the estates of deceased persons are matters exclusively of state cognizance, and are such as were within the competence of the territorial legislature to deal with as it saw fit, in the absence of an inhibition by congress. Indeed, legislation of similar description is by no means unprecedented. By the laws of many states, natural children are permitted to inherit from the mother, and also from the father, in case of the after marriage of their parents, or where there are no lawful children, or where an adoption is made in due form, or where recognition is made by will; and, if the question of parentage be satisfactorily settled, there would seem to be power in the legislature to endow even the children of an adulterous intercourse with inheritable blood from the father. Legislation admitting illegitimate children to the right of succession is undoubtedly in derogation of the common law, and should be strictly construed, and hence it has generally been held that laws permitting such children, whose parents have since married, to inherit, do not apply to the fruits of an adulterous intercourse. *Sams v. Sams' Adm'r*, 85 Ky. 396, 3 S. W. 593. But, while it is the duty of the courts to put a construction upon statutes which shall, so far as possible, be consonant with good morals, we know of no legal principle which would authorize us to pronounce a statute of this kind, which is plain and unambiguous upon its face, void, by reason of its failure to conform to our own standard of social and moral obligations. Legislatures are as competent as courts to deal with these subjects, and, in fixing a standard of their own, are beyond our control. Thus in *Brewer's Lessee v. Blougher*, 14 Pet. 178, 198, it was said by Mr. Chief Justice Taney, speaking for this court, that the expediency and moral tendency of a similar law was a question for the legislature, and not for this court; and it was held in that case that a statute of Maryland, endowing illegitimate children with inheritable blood, applied to such as were the offspring of an incestuous connection. It is true that the peculiar state of society existing at the time this act was passed, and still existing in the territory of

Utah, renders a law of this kind much wider in its operation than in other states and territories, but it may be said in defense of this act that the children embraced by it are not responsible for this state of things, and that it is unjust to visit upon them the consequences of their parents' sins. To recognize the validity of the act is in the nature of a punishment upon the father, whose estate is thus diverted from its natural channel, rather than upon the child; while to hold it to be invalid is to treat the child as, in some sense, an outlaw and a particeps criminis.

It is contended by respondent, however, that even conceding the validity of this statute, it was abrogated and annulled by the anti-polygamy act of congress of July 1, 1862 (12 Stat. 501), the second section of which annuls by title the ordinance for the incorporation of the Mormon Church, and then adds: "And all other acts and parts of acts heretofore passed by the said legislative assembly of the territory of Utah, which establish, support, maintain, shield, or countenance polygamy, be, and the same hereby are, disapproved and annulled: provided, that this act shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor with the right 'to worship God according to the dictates of conscience,' but only to annul all acts and laws which establish, maintain, protect, or countenance the practice of polygamy," etc. As this act was passed before the death of Thomas Cope, and of course before descent cast upon his children, it applies to this case, if the argument of respondent be sound. The question is then presented, does the territorial act of 1852 establish, support, maintain, shield, or countenance polygamy? It clearly does not establish, support, or maintain it. Does it shield or countenance it? It does not declare the children of polygamous marriages to be legitimate; in fact, it treats them as illegitimate, or rather it does not, except by indirection or inference, mention them at all; but it puts all illegitimate children, whether the fruits of polygamous or of ordinary adulterous or illicit intercourse, upon an equality, and vests them with inheritable blood. Nothing is better settled than that repeals, and the same may be said of annulments, by implication, are not favored by the courts, and that no statute will be construed as repealing a prior one, unless so clearly repugnant thereto as to admit of no other reasonable construction. *McCool v. Smith*, 1 Black, 459; *Bowen v. Lease*, 5 Hill, 221; *Ex parte Yerger*, 8 Wall. 85, 105; *Furman v. Nichol*, Id. 44; *U. S. v. Sixty-Seven Packages*, 17 How. 85; *Red Rock v. Henry*, 106 U. S. 596, 1 Sup. Ct. 434. In order to subject the territorial act of 1852 to the annulling clause of the act of congress, its tendency to shield or countenance polygamy should be direct and unmistakable. No law will be declared void, because it may indirectly, or by a possible and not a necessary construction, be repugnant to

an annulling act. Its direct and proximate results are alone to be considered. While, as before observed, the act may have been passed in view of the existing state of things, and as an indirect method of recognizing the legitimacy of polygamous children, it has no tendency in itself to shield or countenance polygamy so far as it applies to children. Legislation for the protection of children born in polygamy is not necessarily legislation favorable to polygamy. There is no inconsistency in shielding the one, and in denouncing the other as a crime. It has never been supposed that the acts of the several states legitimating natural children, whose parents intermarry after their birth, had the slightest tendency to shield or countenance illicit cohabitation, but they were rather designed to protect the unfortunate children of those who were willing to do all in their power towards righting a great wrong. So, if the act in question had been passed in any other jurisdiction, it would have been considered as a perfectly harmless, though possibly indiscreet, exercise of the legislative power, and would not be seriously claimed as a step towards the establishment of a polygamous system.

As this act annuls only such territorial laws as shield or countenance polygamy, if we sustain the construction urged by the respondent here, it must necessarily follow that the children of polygamous marriages would be deprived of their power to inherit from the father, while the offspring of other illicit relations would be left to inherit under the act. This would seem to be at war with the intent of the legislature. But, whatever doubts there may be regarding the proper construction of this act, we think they are dispelled by a scrutiny of the subsequent legislation upon the same subject. In 1876, the legislature of Utah, being evidently in some doubt as to the proper interpretation of the congressional act of 1862, passed another act declaring that "every illegitimate child is, in all cases, an heir to its mother. It is also heir to its father when acknowledged by him." This was followed March 22, 1882, by an act of congress, commonly known as the "Edmunds Law" (22 Stat. 31), which, while providing for further punishment for polygamy and its accompanying evils, in section 7 expressly legitimates the issue of polygamous or Mormon marriages, born prior to January 1, 1883. If the territorial act of 1852 be open to the charge of shielding or countenancing polygamy, much more so is this act, which not only admits polygamous children to the right of inheritance, but actually legitimates them for all purposes. The law remained substantially in this condition, until March 3, 1887, when the act of congress known as the "Edmunds-Tucker Law" (24 Stat. 635) was passed, the eleventh section of which provides that "the laws enacted by the legislative assembly of the territory of Utah, which provide for or recognize the capacity of illegitimate children to inherit or to be entitled to any distributive

share in the estate of the father of any such illegitimate child, are hereby disapproved and annulled; and no illegitimate child shall hereafter be entitled to inherit from his or her father, or to receive any distributive share in the estate of his or her father: provided, that this section shall not apply to any illegitimate child born within twelve months after the passage of this act, nor to any child made legitimate by the 7th section of the act" of 1882.

Here, then, is the first clear and unqualified declaration of congress of its disapproval of the legislation of Utah, recognizing the inheritable capacity of the issue of polygamous marriages, and so careful is congress of rights acquired or existing under these laws that it excepts, by special proviso, all children declared to be legitimate by the seventh section of the act of 1882, as well as all illegitimate children born within 12 months after the passage of this act. These several acts of congress, dealing as they do with the same subject-matter, should be construed not only as expressing the intention of congress at the dates the several acts were passed, but the later acts should also be regarded

as legislative interpretations of the prior ones. U. S. v. Freeman, 3 How. 556, 564; Stockdale v. Insurance Co., 20 Wall. 323. Now, if it had been intended by the act of 1862 to annul the territorial act of 1852, fixing the inheritable capacity of illegitimate children, why did congress in 1882 recognize the legitimacy of children born of polygamous or Mormon marriages, prior to January 1, 1883? Or why, in the act of 1887, did it save the rights of such children as well as of all others born within 12 months after the passage of that act? The object of these enactments is entirely clear. Not only does congress refrain from adding to the odium which popular opinion visits upon this innocent but unfortunate class of children, but it makes them the special object of its solicitude, and at the same time offers to the parents an inducement, in the nature of a locus penitentiae, to discontinue their unlawful cohabitation. Our conclusion is that the appellant, George A. Cope, is entitled to share in his father's estate, and the decree of the supreme court of the territory must therefore be reversed.

SCANLON et al. v. WALSHE et al.

(81 Atl. 498, 81 Md. 118.)

Court of Appeals of Maryland. March 27, 1895.

Appeal from circuit court of Baltimore city.

Petition by Carlotta Walshe against John Joseph Walshe, Catherine Scanlon, and others for confirmation of a sale of land, and for distribution of the proceeds. From a pro forma order overruling exceptions to an auditor's account, allowing a certain sum to other defendants, defendants Catherine Scanlon and others appeal. Reversed.

Argued before ROBINSON, C. J., and ROBERTS, BRISCOE, McSHERRY, and FOWLER, JJ.

Rich. S. Culbreth and Rich. Bernard & Son, for appellants. Henry C. Kennard, for appellees.

FOWLER, J. It is fortunate that courts of justice are seldom called upon to consider a case in which the facts are so shocking to every sense of decency and morality as those presented by the record now before us. We shall not attempt in this opinion to discuss with any particularity the testimony which we think justifies this remark, for the view which has been forced upon us, after careful consideration, renders such an uninviting task altogether unnecessary.

On the 26th March, 1891, David J. Walshe, of Baltimore city, died, leaving a will disposing of his personal property and one-third of his real estate, and intestate as to the balance of his real estate, which latter consisted of by far the larger and more valuable part of the property, known as the "Mansion House," on the northwest corner of Fayette and St. Paul streets, in said city. A bill was filed in the circuit court of Baltimore city by Carlotta Walshe, for the sale of said real estate, against a number of persons claiming to be heirs at law of her husband, David J. Walshe, three of them being her own children, born while she was living in lawful wedlock with a former husband, and the others being sisters and the children of a deceased sister of said Walshe. Proper proceedings were had, and, by agreement of parties, the whole property was sold for the sum of \$70,000, which sale was duly confirmed. By a pro forma order, the court below ratified auditor's account B, by which the sum of \$25,795.41 was allowed to three children of the plaintiff, as their share of the proceeds of sale. From this order the sisters and the children of a deceased sister of Walshe have appealed; and the question is, who are the heirs at law of David J. Walshe?

There are two sets of claimants: First, two sisters and several nephews and nieces; and, secondly, the plaintiff's three children, the youngest of whom is about 24 years of age, who, although born while their mother was married to and living in lawful wedlock with her first husband, Florian V. Simmonds, from whom she was divorced, claim to be the

children of said Walshe, whom she afterwards married, and his heirs at law, because subsequent to their birth their mother and their alleged father married, and he acknowledged them to be his children.

A contention whose foundations are so contrary to good morals, public policy, and the presumptions of law can be maintained only by some statute which not only introduces "a new law of inheritance," as our statute does (*Brewer v. Blougher*, 14 Pet. 178, opinion by Chief Justice Taney), but which, to bring this case within its terms, must also abrogate some rules of evidence which we are not inclined either to weaken or destroy. The statute upon which the appellees, the children of Carlotta Walshe, rely to maintain their contention, is section 29, art. 46, of the Code, which provides that, "if any man shall have a child or children by any woman whom he shall afterwards marry, such child or children, if acknowledged by the man, shall, in virtue of such marriage and acknowledgment, be hereby legitimated and capable in law to inherit and transmit inheritance as if born in wedlock." This section was before this court for construction in the case of *Hawbecker v. Hawbecker*, 43 Md. 516, where a married man had by his wife four children born in lawful wedlock, and during the life of his wife he also had six children by another woman. His wife died, and he subsequently married the mother of the last-mentioned children, whom he acknowledged as his, and treated them as he did the children of his first wife. It was very earnestly contended in that case that the section above quoted should not be construed so as to include within its terms a case in which children are conceived and born when their parents are under impediment to marry. But it was held that although the legislature, no doubt, in thus mitigating the severe rule of the common law, intended to hold out to the surviving parents an inducement to marry, and thus put a stop to the further illicit intercourse between them, yet "the main purpose and intent of the enactment * * * was to remove the taint and disability of bastardy from the unoffending children, whenever their parents did marry, without regard to the deepness of the guilt on the part of the parent." And, in concluding the opinion, the language of Chief Justice Taney in the case of *Brewer v. Blougher*, supra, to the same effect, in relation to the same provision of law, is quoted approvingly. We said: "The legislature has not seen fit to make any exceptions to its operation. Its terms embrace every case where 'any man shall have a child or children by any woman whom he shall afterwards marry.'" *Hawbecker v. Hawbecker*, supra. It will be observed, however, that in the case we have last cited there was no question whatever made as to the paternity or illegitimacy of the children who were admitted to have been born out of wedlock. It

was assumed that the reputed was the real father, and that the children were illegitimate; and the only question was whether the law was applicable to the admitted facts. But here we have a different condition. Indeed, this is the very opposite to Hawbecker's Case; for, while the force of the broad terms of the law is here admitted, it is contended that the foundation facts—the facts of illegitimacy and of the alleged paternity—are not established at all, because—First, the witnesses are incompetent; and, secondly, even if competent, their evidence is not of that strong, distinct, satisfactory, and conclusive character which is required to overcome the presumption expressed in the common-law rule "Haeres legitimus est quem nuptiae demonstrant," or another expression of the same rule, "Pater est quem nuptiae demonstrant." The old rule in England was, and also in this country (1 Greenl. Ev. § 28), that this presumption of legitimacy was conclusive. But it is said the courts did not long permit so violent an estoppel. 1 Bish. Mar. & Div. § 1170. This legal presumption has been characterized as the foundation of every man's birth and status, and of the whole fabric of human society, and nowhere has its full force and extent been so fully acknowledged and so well expressed as in the case of *Hargrave v. Hargrave*, 9 Beav. 553, by Lord Langdale, the then master of rolls, decided in 1846. He says: "A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion; but it may be wholly removed by proper and sufficient evidence showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse." "Such evidence as this," says his lordship, "puts an end to the question, and establishes the illegitimacy of the child of a married woman." And in the same case it was held that where opportunities occurred for sexual intercourse between the husband and wife, and there was no proof of his impotency, no evidence can be admitted to show that any man other than the husband may have been or probably was the father of the wife's child. It was said in *Craufurd v. Blackburn*, 17 Md. 56, that the declarations of the parents were not admissible to defeat the consequences of marriage, such as that the children are bastards; and Lord Mansfield said in *Goodright v. Moss*, Cwop. 594: "It is a rule founded in decency, morality, and policy that the father and mother shall not be permitted to say after marriage that their offspring is spurious." And, in our opinion, the testimony

of the adulterer, when offered for the same purpose, should likewise be excluded; especially so in all cases in which it appears that the proof does not exclude the possibility or probability of access of the husband to the wife. In such cases, as Lord Langdale said in *Hargrave v. Hargrave*, supra, there being no proof of impotency, no evidence will be admitted to show illegitimacy. To this extent, at least, we think the presumption of the legitimacy of the child of a married woman should be conclusive.

The mere fact of marriage and acknowledgment should not, under the facts of this case, be received as proper evidence of illegitimacy. The fact of illegitimacy should first be proved, and then the marriage and acknowledgment may be offered to prove paternity. And so it was held in *Grant v. Mitchell*, 83 Me. 27, 21 Atl. 178. And in *Hemmenway v. Towner*, 1 Allen, 209, the declarations of the adulterer offered to show illegitimacy of the child of a married woman were excluded, the husband and wife having lived together as such until six months next before the birth of the child. It is true these two cases, last cited, were decided upon statutes not altogether like ours; but the questions decided were questions of evidence, and we think what was said in those cases on this subject is particularly applicable to this case. Now, the only testimony before us which can properly be resorted to, to prove illegitimacy, is that of the plaintiff Carlotta Walshe, which, as we have seen, is inadmissible for that purpose. At the most, her testimony may be offered to show she was untrue to her husband. 1 Bish. Mar. & Div. And so, also, as to the declarations and letters of David Walshe which appear to have been offered to prove acknowledgment of the children. Neither will be admissible to show the husband is not the father, if he had or could have had access, as indicated in *Hargrave v. Hargrave*, supra; and that he could have had access, we think, is clearly shown in this case, for the separation did not occur until several years after the birth of the youngest child. But the testimony of Carlotta Walshe, as well as that of the adulterer, if he were alive, would be inadmissible to show bastardy, and equally so his declarations, because they are both estopped to swear to a state of facts in conflict and inconsistent with the proceedings for divorce, and for change of name of her three younger children. She will not be allowed now to come into court, and recklessly contradict what she alleged in the one and swore to in the other. *Edes v. Garey*, 46 Md. 41; *Hall v. McCann*, 51 Md. 351; *Railroad Co. v. Howard*, 13 How. 335. And it appearing that he was the instigator of both proceedings, and in a position to know the truth, the estoppel should work equally against him, his declarations and his letters.

In the supplemental brief on the part of

the alleged children of Walshe, filed a few days ago, it is suggested that the objections now relied on in this court to most of the testimony are not covered by the exceptions filed by the appellants below, and David J. Walshe is spoken of as a witness whose testimony was objected to below only on the ground of estoppel. It should, however, be observed that he is not a witness. His declarations, verbal and written, were offered, and the testimony of all the witnesses who testified to the former, as well as the latter, which were offered in evidence, all of which was offered to show recognition of the children, was excepted to on the ground of estoppel. And, while it may be that the estoppel of the divorce and other proceedings may not go to the extent urged by the appellants, yet, as we have already said, both David J. Walshe, if living, would be, and Carlotta Walshe is, thereby estopped to take positions inconsistent therewith. And we think the exceptions on the ground of estoppel, filed below, fairly cover the additional grounds of estoppel urged in this court; for while it is required that every exception, in order to be availed of in this court, must be reduced to writing, and filed in the court below at least before the hearing there begins, yet it is not necessary to set forth all the reasons and grounds on which such exceptions are based.

But we think it unnecessary to prolong this discussion. It is conceded the exceptions filed below cover the testimony of Carlotta Walshe as to nonaccess, and, hav-

ing sustained the exception based on this objection, her testimony as to any collateral fact for the purpose of proving nonaccess would also be inadmissible. Wrightman, Mar. & Leg. 1441. And it must be remembered that we have been considering what is the true rule by which to measure the amount and character of evidence required to prove the child of a married woman to be a bastard, which child is born while the mother is living in lawful wedlock with her husband. And although, in this particular case, the woman herself and her children, the youngest of whom is 24 years old, are trying to establish the illegitimacy of the children, and for that purpose are asking us to destroy or weaken this rule, which the experience of many years and the wisdom of eminent judges have sanctioned, we must remember that such position is seldom occupied by either the mother or her offspring. She and they are more frequently interested in guarding and enforcing the rule which protects the rights of legitimate rather than the rights of illegitimate children. We feel bound to say, however, that, if all the testimony we have thus excluded were properly before us, we could not, while giving full force and effect to the legal presumption of legitimacy, and in the absence of that strong, distinct, satisfactory, and conclusive testimony required to overcome that presumption, do otherwise than reverse the pro forma order appealed from. Order reversed, and cause remanded; costs to be paid out of the fund in hand of the trustees.

WILLIAMS v. KIMBALL.

(16 South. 783, 35 Fla. 49.)

Supreme Court of Florida. Feb. 5, 1895.

Appeal from circuit court. Duval county; W. B. Young, Judge.

Ejectment by Mark Williams against Adolphus Kimball. Judgment for defendant, and plaintiff appeals. Affirmed.

Cooper & Cooper, for appellant. M. C. Jordan and R. B. Archibald, for appellee.

LIDDON, J. Diana Landsbury (sometimes called in the record Diana Landsbury Kimball), a negro woman, who was born a slave, died in Duval county, Fla., on the 23d day of November, 1885, seized in fee simple of a tract of land situated in said county. The case below was an action of ejectment brought by the appellant against the appellee, who is in the possession of the property, claiming as the husband and heir at law of said Diana, who left no children surviving her. The judgment was for defendant.

The validity of the title of the defendant is attacked upon the ground that he is not the lawful husband and heir of the deceased Diana. In actions of ejectment the plaintiff must recover upon the strength of his own title, and not upon the weakness of the title of his adversary. In view of the conclusion that we have reached, that the plaintiff has shown no right of recovery, it is unnecessary to pass upon the title of the defendant. The deceased had no living relatives except the appellant, Williams. Williams claimed to be a brother of Polly Page, the mother of said Diana. Both the appellant and Polly Page were born slaves,—of the same slave father and mother. Whether they were the children of a customary slave marriage, or some other cohabitation, does not appear from the record; but the said slave marriage or cohabitation, whichever it was, terminated before the emancipation of the parties thereto. The only question necessary to be considered is the inheritable capacity of the appellant, who (the land being held adversely) has made a quitclaim deed of the property to John Wallace, for whose use he brings suit. The question of the inheritable capacity of persons born of slave marriages is one upon which there has been considerable diversity of opinion. In this state it has been settled for years that the offspring of such marriages, which have never been recognized by the parties thereto after they became free persons, and capable of making such contracts of marriage, have no inheritable blood; they cannot inherit property acquired by their ancestors after emancipation. Daniel v. Sams, 17 Fla. 487. It is contended, however, that the plaintiff, Williams, is, and has always been, a resident of the state of Georgia; that by an act of that state he has been legitimated; and that, thus being legitimate in Georgia, he has a status established

by law which makes him legitimate in every other state and country. The effect of this contention would be that the capacity of a person to inherit real estate in this state would depend, not upon our laws, but upon the varying statutes of perhaps a hundred or more different states or countries in which the claimants of the estate might reside. In such a state of the law, one a resident citizen of the state would be excluded as an heir, but would be entitled to share in the estate if he accidentally lived over the border line of an adjoining state. This contention of the appellant cannot be sustained. By the common law, which is law with us, all questions of the distribution and descent of real estate must be determined by the law of the jurisdiction in which the property is situated. Speaking upon this subject, Story, *Conf. Laws*, § 483, says: “* * * The descent and heirship of real estate are exclusively governed by the law of the country within which it is actually situate. No person can take, except those who are recognized as legitimate heirs by the laws of that country, and they take in the proportions and the order which those laws prescribe. This is the indisputable doctrine of the common law.” Such is even the more prevalent view among the law writers of those countries where the common law does not prevail. “Foreign jurists generally, although not universally, maintain the same doctrine, and accordingly hold that, in cases of succession ab intestato, we are to ascertain the persons who are to take the inheritance by the *lex loci rei sitae*, whether the question respects legitimacy, or primogeniture, or right of representation, or proximity of blood, or next of kin.” *Id.* § 484a. Among a great mass of authorities which sustain the propositions quoted from Story are Boyce v. City of St. Louis, 29 Barb. 650; Dawes v. Boylston, 9 Mass. 837; Bryan v. Moore, 11 Mart. (La.) 26, and authorities cited in note; 8 Am. & Eng. Enc. Law, 566; Abston v. Abston, 15 La. Ann. 137; Potter v. Titcomb, 22 Me. 300; Elliott v. Lord Minto, Madd. & Gel. 16; Chapman v. Robertson, 6 Paige, 627.

Being convinced that a Georgia statute not in harmony with our system, upon the capacity of persons to inherit real estate, could not prevail here, we have not attempted to interpret or construe the same. It cannot be denied that a number of decisions can be found upholding the proposition that persons made legitimate by the laws of one state are legitimate everywhere. We have taken great pains to examine a number of these decisions. They mostly apply to residents of the states in which suits are brought, who, before their removal thereto, have been legitimated in other states. Some proceed upon statutory grounds. Some expressly repudiate the common law and ancient English statutory doctrine. Before the parliament of Merton, in the twentieth year of Henry III., A. D. 1235, it had been the

law of England, with respect to the descent of land, that the son must be born after the actual marriage of his father and mother. This rule was framed for the express purpose of excluding in the descent of land in England the application of the rule of the civil and canon law, by which the subsequent marriage of the parents was held to make the son born before marriage legitimate. At the parliament of Merton the clergy proposed to change the law so that antenati legitimated by the marriage of their parents might inherit, but the barons refused to change the law of the realm. Therefore, the statute of Merton, instead of being a new enactment upon the subject, was a legislative declaration of an ancient law. It has been declared to be in force in England, by the British house of lords, as late as 1839. *Birtwhistle v. Vardill*, 7 Cl. & F. 895, 6 Bing. N. C. 885. It is now, by adoption, the law in this state (page 708, § 7, McClel. Dig.); and, with the statutory exceptions hereinafter noted, those only possess heritable blood who are born in lawful wedlock, or in a competent time after its termination. It has been held that legitimization in a foreign country does not make lawful heirs, in other countries, where the common law or the statute of Merton is now in force, of those who were born out of lawful marriage. So far as the law of descents is concerned, the *lex loci rei sitae* must prevail, and the different states of this Union are foreign countries to each other. In the case of *Birtwhistle v. Vardill*, *supra*, it was decided that a child born in Scotland before the marriage of his parents, but who was legitimated by their subsequent marriage, according to the laws of that country, could not inherit lands in England. In *Lingen v. Lingen*, 45 Ala. 410, it was held that a bastard child conceived in Alabama, but born in France, and legitimated by an acknowledgment of the father in due form of law, according to the laws of that country, was not a lawful heir to real estate in Alabama. In *Smith v. Derr's Adm'rs*, 34 Pa. St. 126, under the authority of *Birtwhistle v. Vardill*, 5 Barn. & C. 438, and same case on appeal to the house of lords, cited above, it was held that a bastard child duly legitimated by a decree of a circuit court of Tennessee, according to the laws of that state, was not thereby rendered capable of inheriting land in Pennsylvania. Later decisions in Pennsylvania are to different effect, but they are placed upon the express ground that the statute of Merton has been abolished in that state since the decision in *Smith v. Derr's Adm'rs*.

The status of negroes born in marriages terminating before the general emancipation of the slaves in the Southern states is a peculiar one. To some extent the right of marriage was recognized among them. It is a part of the history of the extinct institution of slavery in the Southern states that

these slave marriages were often had with the approbation of the owners of the slaves; that the marriage ceremonies were publicly celebrated, often by the ministers of the gospel, and were sanctioned by the churches of the country. The subsequent cohabitation of the parties was never regarded as illicit or immoral, but as perfectly right and proper, and it was regarded as a wicked thing for either party to be unfaithful to the marriage vow. The children born of such marriages were regarded as standing upon a different plane to those slave children who were bastards, pure and simple. These views prevailed from regarding marriage as a Divine institution, and not from looking upon it from the standpoint of the law, which has concern with it only as a civil contract. The progeny of such marriages, while, perhaps, from a liberal point of view, they are not bastards, are yet, so far as want of inheritable blood is concerned, placed in the same category as bastards. It is therefore, we think, entirely right and proper to give the appellant the benefit of any statute changing the ancient statute of Merton by adding to the inheritable capacity of bastards. The appellant not claiming to have been legitimated by a subsequent marriage of his parents, in accordance with the statute of 1828 (McClel. Dig. p. 127, § 5), the only change in our law which affects his claim is the act of 1829 (McClel. Dig. p. 470, § 8), and is as follows: " * * * Bastards, also, shall be capable of inheriting or of transmitting inheritance, on the part of their mother, in like manner as if they had been lawfully begotten of such mother." In the present case the estate never vested in the appellant's mother. She died, it appears, before the abolition of slavery. Neither did it vest in Polly Page, the mother of the intestate, and sister of appellant. She (Polly Page) died some years before the intestate.

The appellant claims to inherit by descent from his niece. The question presented is, does the act under consideration legitimate the appellant in all respects, so far as the kindred of his mother is concerned, and can he take by inheritance from collateral kindred upon his mother's side? We think not. The construction given generally by the courts to acts of this kind has been a strict one. In such cases it has been held that a bastard might inherit from his mother, or his mother from him; but there the inheritable blood became dammed up in his veins, and its current could flow no further. It did not extend to collateral kindred. The very language of the statute of this state has been construed by the supreme court of the United States in the case of *Stevenson's Heirs v. Sullivant*, 5 Wheat. 207, text 260. The court, upon this subject, says: "The eighth section of the law of descents, under which this question arises, is as follows: " * * * Bastards, also, shall be capable

of inheriting or of transmitting inheritance, on the part of their mother, in like manner as if they had been lawfully begotten of such mother.' In the construction of this section, it is never to be lost sight of that the appellants are to be considered as bastards, liable to all the disabilities to which the common law subjects them as such, except those from which the section itself exempts them. Though illegitimate, they may inherit and transmit inheritance, on the part of the mother, in like manner as if they had been lawfully begotten of the mother. What is the legal exposition of these expressions? We understand it to be that they shall have a capacity to take real property by descent immediately or through their mother, in the ascending line, and transmit the same to their line, as descendants, in like manner as if they were legitimate. This is uniformly the meaning of the expression, 'on the part of the mother or father,' when used in reference to the course of descent of real property in the paternal or maternal line. As bastards, they were incapable of inheriting the estate of their mother, notwithstanding they were the innocent offspring of her incontinence, and were therefore, in the view of the legislature, and consonant to the feelings of nature, justly entitled to be provided for out of such property as she might leave undisposed of at her death, or which would have vested in her, as heir to any of her ancestors, had she lived to take as such. The current of inheritable blood was stopped in its passage from and

through the mother, so as to prevent the descent of the mother's property and of the property of her ancestors either to her own illegitimate children, or to their legitimate offspring. The object of the legislature would seem to have been to remove this impediment to the transmission of inheritable blood from the bastard, in the descending line, and to give him a capacity to inherit in the ascending line, and through his mother. But although her bastard children are, in these respects, quasi legitimate, they are nevertheless, in all others, bastards, and as such they have and can have neither father, brothers, nor sisters. They cannot, therefore, inherit from Richard Stevenson, because, in contemplation of law, he is not their brother; and, even if he were their brother, they would not inherit their estate under this section, on the part of their mother, but directly from Richard, the descent from brother to brother being immediate. Upon no principle, therefore, can this section help the appellants' case. His estate never vested in the mother, so as for her bastard children to inherit from her, nor did it pass through her, in the course of descent, to the bastard children." To the same effect are *Jackson v. Jackson*, 78 Ky. 390; *Curtis v. Hewins*, 11 Metc. (Mass.) 294; *Pratt v. Atwood*, 108 Mass. 40; *Haraden v. Larabee*, 113 Mass. 430. Considering the appellant as a bastard, he is not able, by our statute, to take the estate sued for.

The judgment of the court below is affirmed.

MORAN v. STEWART.

(28 S. W. 962, 122 Mo. 295.)

Supreme Court of Missouri, Division No. 1.
May 28, 1894.Appeal from circuit court, Andrew county;
C. A. Anthony, Judge.Action by Angie Moran against Samuel
Stewart. From a judgment for defendant,
plaintiff appeals. Affirmed.David Rea and Jas. F. Pitt, for appellant.
P. Mercer, Booher & Williams, and J. A.
Sanders, for respondent.

BLACK, O. J. On the 17th April, 1869, David Moran and his wife, Catharine Moran, by deed duly executed, acknowledged, and recorded, adopted the defendant, Samuel Stewart, as their child and heir. Catharine Moran died, leaving her husband surviving. Thereafter, and on the 5th February, 1891, he and the plaintiff in this suit were married. He died testate on the 13th March, 1892, having devised the 400 acres of land now in question to Samuel Stewart, his adopted son. On the 8th September, 1892, the plaintiff signed, acknowledged, and recorded her election to take one-half of the real and personal estate of deceased in lieu of dower. She then brought this suit for the partition of the 400 acres, basing her claim to the one-half on the theory that her husband died "without any child or descendant in being capable of inheriting," within the meaning of Rev. St. 1889, § 4518. Section 4518, being the first section of the dower act, provides that "every widow shall be endowed of the third part of all lands whereof her husband or other person to his use, died seized of an estate of inheritance," to hold and enjoy during her natural life. Section 4518: "When the husband shall die without any child or other descendants in being, capable of inheriting, his widow shall be entitled: First * * *; second, to one-half of the real and personal estate belonging to the husband at the time of his death, absolutely, subject to the payment of the husband's debts." Section 4520: "When the husband shall die without a child or other descendant living, capable of inheriting, the widow shall have her election to take her dower, as provided in section 4518, discharged of debts, or the provisions of section 4518, as therein provided."

Now, the first section of the act concerning the adoption of children provides that "if any person in this state shall desire to adopt any child or children as his or her heir or devisee, it shall be lawful for such person to do the same by deed, which deed shall be executed, acknowledged and recorded in the county of the residence of the person executing the same, as in the case of conveyances of real estate." This section, it will be seen, speaks of adopting a child as heir or devisee. It is difficult to see what the legislature meant by the use of the word "devisee." One thing is certain, and

that is this: that the deed of adoption cannot operate as, and perform the functions of, a will. The adopting parent may dispose of his property by last will, the same as if the adopted child had been his child born in wedlock. Much carelessness and want of precision is disclosed in this and other sections of the same act, and it is quite evident that the word was not used in its legal sense. We think it may be disregarded without changing in the least the force, effect, and meaning of the statute. This and other sections of the statute concerning the adoption of children have been before this court, directly and indirectly, on several occasions. Reinders v. Koppemann, 68 Mo. 482; Id., 94 Mo. 338, 7 S. W. 288; Sharkey v. McDermott, 91 Mo. 647, 4 S. W. 107; Davis v. Hendricks, 99 Mo. 478, 12 S. W. 887; Fosburgh v. Rogers, 114 Mo. 122, 21 S. W. 82. The conclusion to be drawn from these cases, so far as they bear upon the question in hand, is this: The husband or wife, or both, may adopt a child as his, her, or their heir; and the adopted child will inherit from the adopting parent or parents, the same as if born of such adopting parent or parents in wedlock. For all the purposes of inheriting from the adopting parent, the adopted child becomes and is the lawful child of such adopting parent. The adopted child of the husband is a "child," within the meaning of section 4518, before set out. The defendant, Samuel Stewart, was therefore the child of David Moran, within the meaning of that section. But it is said that this conclusion cannot be the correct one, because it defeats the widow of dower rights conferred upon her by the dower act. We see no force whatever in this contention. Section 4518 gives her dower of one-third for life. Under certain circumstances, she may elect to take under that section, or to take one-half of the property, real and personal, subject to the payment of debts, under section 4518. The circumstances under which a widow has the right to elect did not exist in this case, because David Moran died leaving a child capable of inheriting from him. It is therefore perfectly clear that the plaintiff was not and is not entitled to the one-half of the lands in suit. So the trial court held, and its judgment is affirmed.

The defendant set up an alleged marriage contract between David Moran and the plaintiff, claiming that she thereby received certain real estate, by way of jointure, as a provision for her support, in full discharge of dower in the real estate of her intended husband. The plaintiff contends that this contract, though signed, was never delivered, and, if delivered, it does not bar dower. These questions were not considered by the trial court, and are not considered here; for the conclusion before reached leads to an affirmation, no matter what our views may be as to these questions concerning the alleged marriage contract. The judgment is affirmed. All concur.

GORDON v. POTTER.

(17 Vt. 348.)

Supreme Court of Vermont. Windsor. Feb.
Term, 1845.

Book account. Judgment was rendered against the defendant by default, and an auditor was appointed, who reported, in substance, as follows. The plaintiff presented an account against the defendant for cloth and trimmings for a suit of clothes, delivered by him, in June, 1841, to Augustus Potter, the minor son of the defendant. At the time of the sale the son was at work by the month for one Russell, in Shrewsbury, by permission of the defendant,—who resided in Plymouth. The plaintiff, before the sale, knew where the defendant resided, and was informed by Russell that he was to furnish the son with some clothing, when the time was out for which he was to work, which would be the first of October following, and that, if he, plaintiff, sold the clothing to the son, he could not pay him for them before the first of October. It appeared that the defendant told his son, in the spring, to go out to work, and that in the fall he would get him some winter clothes; and it did not appear that he refused to get the clothes for his son, but that he neglected to do so. It farther appeared that the defendant knew of the purchase made of the plaintiff by the son, and that he furnished to the son one dollar in money, with which to pay for making up the clothes, and gave him a part of his earnings, and that he permitted the son to wear out the clothes. The county court rendered judgment for the defendant, upon the report; to which decision the plaintiff excepted.

S. Fullam, for plaintiff. T. Hutchinson, for defendant.

REDFIELD, J. This case presents the question, how far a parent is liable for necessaries furnished to his minor child. The report of the auditor, which is the basis of the judgment below, which we are now revising, seems to leave the case defective in many particulars, as against the father. It does not appear, except by way of inference, that the articles charged were furnished upon the credit of the father, or, in other words, that the plaintiff, at the time they were delivered to the son, expected the father to pay for them. And I take it to be well settled law, that, if one trades with the son, and gives credit to him alone, knowing all the facts in the case, he can never, after that, sustain an action against the father for articles thus delivered. And this is upon the ground, that, if one trade with the agent, and give credit to him personally, knowing of his agency, the principal is not liable.

But there is one defect in the case, which we think must clearly, and indisputably, preclude any recovery against the father. It does not appear that the father ever gave the son any authority, either expressly, or by implication, to pledge his credit for the articles; but the contrary. And unless the father can be made liable for necessaries, for his infant child, against his own will, then, in this case, the plaintiff must fail to recover. I know there are some cases, and *dicta* of judges, or of elementary writers, which seem to justify the conclusion, that the parent may be made liable for necessities for his child, even against his own will. But an examination of all the cases upon this

subject will not justify any such conclusion.

Chancellor Kent (2 Com. 191.) says, "During the minority of the child the parent is absolutely bound to provide reasonably for its maintenance and education, and he may be sued for necessaries furnished, and schooling given to a child, under just and reasonable circumstances." Ch. J. Swift (1 Dig. 41,) uses much the same language. None of the cases referred to by these writers justify the language used. Van Valkinburgh v. Watson (18 Johns. 480,) is relied upon by both these writers to sustain their position. But the decision in that case was in favor of the father. The court say, indeed, that, had he absolutely refused to furnish necessaries to his minor child, he might be made liable for them, when furnished by a stranger. But the decision involved no such question, and called for no such declaration. Chancellor Kent refers to Stanton v. Willson, (3 Day 37,) which, although a Connecticut case, is not adverted to by Ch. J. Swift; from which we conclude he did not esteem it in point. The rule laid down in this last case is broad enough to make the father liable, against his will. "When an infant child elopes (?) from his father for fear of personal violence and abuse, and cannot with safety live with him, the father is liable for necessary support and education, furnished to such child by a stranger." But the case before the court was, where the necessities had been furnished to the child by consent of the legally constituted guardian, the mother, after a divorce *a vinculo*. Chancellor Kent also refers to Simpson v. Robertson, (1 Esp. Cas. 17.) But this case merely decides, that the father is not liable for articles of clothing furnished to the son by a tailor, "who colludes with the son, and furnishes him with clothing to an extravagant degree." Ford v. Fothergill (Ib. 211) is also referred to by Chancellor Kent. But this was a case against the son, and the only question moved in the case was, as to the extent of the liability of an infant for necessities. Stone v. Carr (8 Esp. Cas. 1.) is likewise referred to by Chancellor Kent. This case only determines the extent of one's liability for necessities furnished to his wife's children, by a former husband, when they form a portion of his family. No other authorities are referred to, and it is presumed none other exist, or they would not have been overlooked by such an indefatigable reviser as the learned Chancellor, whose opinions are, in our American courts, deemed law, and are sought with almost equal avidity by the proprietors of railroads, and by the impeachers of presidents. But, notwithstanding the usual accuracy of the learned commentators referred to, it needs no farther argument to show, that their opinion, on this point, is without the support of any decided case.

An examination of the English cases, upon this point, will show, that the parent cannot be made liable for necessities, furnished to his child, without his consent, either express, or implied. The case of Bainbridge v. Pickering (2 W. Black. 1825,) is the same, almost, as that already quoted from 18 Johns. 480. But the opinion of the court shows more the sense of the English courts upon the important matter of family government. Gould, J., says, "No man shall take upon him to dictate to a parent, what clothing the child shall wear, at what time they shall be purchased, or of whom. All that must be left to the discretion of the father and mother." In the case of Baker v. Keen, 3 Eng. C. L. 505, [2 Stark. R. 501,] which was tried before the late Lord Tenterden, then Ch.

J. Abbott, it was held, that, when a minor "orders articles, which are necessary to his condition in life, it is a question for the jury, under all the circumstances in the case, whether they can infer an authority given to that effect by the father." The Lord Chief Justice says. "A father would not be bound by the contract of his son, unless either an actual authority were proved, or circumstances appeared from which such an authority might be implied." In *Fluck v. Tollemache*, 12 Eng. C. L. 15, [1 Car. & P. 5.] it is held, that a "father is not bound to pay for clothing furnished to his son, without some contract, express, or implied on his part, to do so." *Borrough, J.*, says, "An action can only be maintained against a person for clothes, supplied to his son, either when he has ordered such clothes, and contracted to pay for them, or when they have been at first supplied without his knowledge, and he has adopted the contract afterwards." *Rolfe v. Abbott* is to the same point; 25 Eng. C. L. 426, [6 Car. & P. 286.] Baron Gurney told the Jury, that, "to charge the father, it is essential that the goods should have been supplied with his assent, or by his authority." In *Law v. Wilkin*, 38 Eng. C. L. 378, [6 Adol. & El. 718] the same rule is confirmed, although a new trial is there granted, upon the ground that the case should have been submitted to the jury. From which we conclude such is the acknowledged rule of law in Westminster Hall, or so many of the judges would not be found so unanimous in declaring "it. And it is obvious, that it makes no provision for strangers to furnish children with necessities, against the will of parents, even in extreme cases. For if it can be done in extreme cases, it can in every case, where the necessity exists; and the right of a parent to control his own child will depend altogether upon his furnishing necessities, suitable to the varying taste of the times. There is no stopping-place short of this, if any interference whatever is allowed. If the parent abandons the child to destitution, the public authorities may interfere, and, in the mode pointed out by statute, compel a proper maintenance. But this, according to the English common law, which prevails in this state, is not the right of every intermeddling stranger.

The following English cases serve to show still more clearly, the opinion entertained there upon this subject, than the earlier cases. *Blackburn v. Mackey* 1 Car. & P. 1, [12 Eng. C. L. 18.] decides that "a father is not liable for clothes furnished to his son, though under age, without some proof of a contract on his part, either express or implied." The proof in that case was, that the son was in want of clothes, and his father did not furnish him with any, or with money, and he obtained them of the plaintiff. Abbott, Ch. J., says, "The question deeply affects society; for if persons in trade are allowed to trust young men, and compel their fathers to pay them, any man, who had a family, might be ruined. A father is not bound to pay for articles ordered by his son, unless the father gives some authority, express, or implied." In *Seaborne v. Maddy*, 9 Car. & P. 497, [38 Eng. Com. L. 294.] it is decided, that "no one is bound to pay another for maintain-

ing his children, unless he has entered into some contract to do so. Every man is to maintain his own children, as he himself shall think proper, and it requires a contract to enable another person to do so, and charge him for it in an action." This was as late as 1840, before Mr. Baron Parke. In a note to this case, I find a report of the case of *Mortimore v. Wright*, from the London Law Journal, vol. 9, Excheq., p. 158, in which it was decided, in the exchequer chamber, upon writ of error, that a father is not liable for debts incurred by his son, while under age, unless he has given an authority to the son to incur them, or has contracted to pay them; and that the moral obligation he is under to support his children ^{*354} infers no such liability. In that case Lord Abinger, Ch. B., said, "In point of law, a father, who gives no authority and enters into no contract, is not liable for goods supplied to his son, any more than an uncle, a brother, or a stranger, would be. The mere moral obligation upon a father to maintain his child (which I by no means deny,) affords no inference of a promise to do so. In order to bind a father for a debt incurred by his son, you must prove that he has contracted to be bound, in the same manner you would prove such a contract against any other person; and it ought not to be left to juries to make the law in each particular case, according to their own feelings or prejudices." Baron Parke says, "It is a clear principle, that a father is not under any legal obligation to pay his son's debts, unless he has contracted so to do, except, perhaps, under the 43 Eliz., under which he may, under certain circumstances, be compelled to support his children according to his ability. A mere moral obligation can impose upon him no such legal liability."

In this case all the former cases are elaborately reviewed, and many of them limited and qualified, and the foregoing may be considered the settled law in Westminster Hall, so late as 1840. It need not be remarked how precisely it corresponds with the view we had taken of what the law was, and what it should be. The laws are made and administered by young men far more in this country than in England, but it is to be hoped that will not induce us to depart from so salutary a rule of law, as that giving the father the control of his own household and property. There is full enough disposition of late to subject fathers to the caprices, or the excesses and extravagance, if not the domination, of thoughtless and heartless sons, in concurrence with others, who subsist by deluding and destroying sons, who might otherwise be sober and decent. One could hardly desire to see the tendencies in that direction increased. A father, who supports his family, ought, it would seem, to be consulted as to the mode in which it shall be done; and, if he will not support them, "being of ability," the statute points out the remedy the same in this state as in England. I know the law is different as to the wife, and there are substantial reasons why it should be. She may always buy necessities on her husband's credit, if he turn her off, without her fault, or refuse to find her a suitable maintenance at home. Judgment affirmed.

PYATT et al. v. PYATT.

(18 Atl. 1048, 46 N. J. Eq. 283.)

Court of Errors and Appeals of New Jersey.
Feb. 6, 1890.Appeal from prerogative court; McGILL, Ordinary. See 15 Atl. Rep. 421.
Mr. Rice and A. H. Strong, for appellants.
Mr. Adrian, for respondent.

DIXON, J. In April, 1887, the appellant Mary N. Pyatt was cited to account before the orphans' court of Middlesex county as guardian of her daughter Mary E. Pyatt, and forthwith filed her account, charging herself with \$435.78 received in December, 1878, and various small sums of interest, amounting to \$101.54, received subsequently, and praying allowance for \$2,098.28, of which \$1,872 was for board and maintenance of the ward from January 1, 1875, to December 31, 1886, at \$8 per week. On exceptions filed by the ward, testimony was taken, the guardian being the only witness examined, and thereupon the orphans' court allowed the account as presented. On appeal to the prerogative court, the ordinary disallowed all the credits claimed, and the guardian has now brought his decree to this court for review.

The facts proven are as follows: Samuel L. Pyatt died intestate, January 11, 1868, seized of his homestead farm, and possessed of some personalty, leaving his widow, the appellant, and four young children, of whom the respondent is the oldest. Letters of administration were granted to the widow and her father, and the widow and children continued to reside upon the homestead farm as one family, no dower being set off to her. On August 18, 1874, the widow was appointed guardian of each of her children, and in December, 1874, she came into possession of her wards' distributive shares in their father's personal estate. The share of the respondent was \$435.78. The guardian used the funds of her children in supporting them as members of her household, and, when these were exhausted, borrowed from her father, who was also surety on her guardianship bonds. She kept no account of her expenditures, and does not attempt to specify those made on behalf of each individual child. She swears, however, that the charge of three dollars per week for the board and maintenance of the respondent is fair and reasonable, and that all the moneys received by her as guardian had been actually expended by her in maintaining her daughter. These statements are uncontradicted, and there is no ground for doubting their truth.

The ordinary rejected the allowance claimed for the support of the ward during her minority, which ended October 5, 1876, because he drew from the circumstances an inference that the guardian was supporting the ward as a member of her family, without expecting compensation therefor. But we deem that inference unwarranted. The actual use

of the very moneys in her hands as guardian, to purchase the necessaries of life for the children, shows unmistakably that she was not intending to support them at her own expense. Indeed, she seems not to have had any other resources for their maintenance. As a general rule, a widow is not bound to support her minor children out of her own property, if they have means of their own, (2 Kent, Comm. 190,) and she is entitled to a complete indemnity out of their estate for the money expended by her on their maintenance, within proper limits, (Bruin v. Knott, 1 Phil. Ch. 571; In re Bostwick, 4 Johns. Ch. 104.) It necessarily follows that when she has cast upon her, as their guardian, the duty of maintaining them, and has actually used their money for that purpose, she must be considered to have meant to charge their estate with their support, and all reasonable expenditures therefore should be allowed to her. The fact that the present guardian kept no accounts is excused by the evident impracticability of exactly distributing among the several members of her family the current expenses of the household. If she were seeking to charge the ward with specific payments made on her behalf, an itemized account might properly be insisted on, but, the charge being in its nature one of estimation merely, it is enough if the court can see that the estimate is within just bounds. This is plain. The charge for maintenance during the ward's minority should be allowed.

The cost of maintenance after majority was disallowed by the ordinary on the ground that the orphans' court had no jurisdiction over matters occurring between the parties after the ward became of age. He agreed with the orphans' court in believing that an understanding existed between the mother and daughter that the daughter's money in her mother's hands was to be used in supporting the family, including the daughter, and that the money was so used, but he decided that the account must close at the termination of the guardianship, and the balance be ascertained and decreed as of that date. We do not concur in this view of the law. The orphans' court is a court of general jurisdiction over the subjects committed to its cognizance. Den v. Hammel, 18 N. J. Law, 73. It partakes of the powers of a chancery and prerogative jurisdiction, being instituted to remedy and supply the defects in the powers of the prerogative court with regard to the accountability of executors, administrators, and guardians; and such construction should be given to the statutes establishing and regulating its authority as, consistently with the obvious intentions of the legislature, will advance and extend their remedial provisions. Wood v. Tallman, 1 N. J. Law, 153; Seaman v. Duryea, 11 N. Y. 324. Our present statute (Revision, p. 753, § 2) invests the orphans' court with full power and authority to hear and determine all controversies respecting the allowance of the accounts of executors, administrators, guardi-

ans, and trustees under wills, and authorizes it to issue process to compel such persons to account for the estates in their hands. The court may also (section 160) compel obedience to its process, orders, and sentences by imprisonment or distress, and (section 161) its decrees or orders, whereby a sum of money is ordered to be paid by one party to another, being properly recorded, have the same liens and priority as judgments of the circuit court, and like executions may issue thereon. This language, we think, imports that the orphans' court may require executors, administrators, guardians, and trustees under wills to render accounts of the estates committed to them, and may ascertain the condition of the estate in their hands, upon such accounting, as fully as can the court of chancery. In the latter court it was decided by Vice-Chancellor Sir JOHN LEACH, and, on appeal, by Lord ELDON, that where a guardian, after his ward attains full age, and before the accounts of his receipts and payments during the minority are settled, continues to manage the property at the request of the ward, it is, in effect, a continuance of the guardianship as to the property, and he must account on the same principle as if they were transactions during the minority. In such circumstances, equity will enjoin the guardian from proceeding at law to recover a balance claimed to be due him on the transactions after his ward became of age, and will require him to state and settle the whole account in a tribunal having jurisdiction of the guardianship. *Mellish v. Mellish*, 1 Sim. & S. 188. According to this doctrine, the accountability of a guardian for his ward's estate remains the same after the ward's majority as before, until he has transferred the estate to the ward, or until the parties themselves have agreed to place the guardian's responsibility on a different footing. The jurisdiction of the orphans' court embraces this entire accountability. It would be a narrow, not a liberal, construction of the statutory terms which authorize this court to compel guardians "to account for the estates in their hands," to say that it can compel such an account only up to the time when the ward becomes of age, and that guardians must "account for the estates in their hands," so far as their subsequent dealings with such estates are concerned, in some other tribunal.

Another consideration leads to the same conclusion. In *Seaman v. Duryea*, 11 N. Y. 324, the New York court of appeals, speaking of the jurisdiction of surrogate's courts, which had been granted by terms similar to those employed in our orphans' court acts, said: "It was the intent of the legislature, in conferring this jurisdiction upon surrogates, to provide an inexpensive and summary process for the settlement and adjustment of the accounts of guardians, and to supersede the necessity of a resort to the court of chancery for that purpose. In other words, for all the purposes of settling accounts between guardians and wards, and

finally adjudicating thereon, the surrogate's court was invested with all the jurisdiction which had before been exercised by the court of chancery, to be exercised, however, in the cases and in the manner prescribed by statute; and, while surrogate's courts can only exercise the jurisdiction expressly conferred upon them, the statutes, being remedial and for the advancement of justice, should receive a favorable construction, and such as will give to them the force and efficiency intended by the legislature. * * * If the powers of the surrogate should be restricted to requiring the guardian to render an account of his doings, which may in a limited sense be held to be an accounting, or if it should be held that the surrogate is invested with power to examine the account rendered, allow and disallow items, and finally adjust and settle the same, and strike a balance, without power to decree the payment of such balance, the remedy will come far short of that afforded by the court of chancery, and the legislature will have failed to provide the substitute they designed. The parties pursuing will be compelled to resort to another court by an independent action, to obtain the relief which before would have been had in one action. * * * The accounting to which a guardian may be subjected, by proceedings before the surrogate, is not only a statement of his receipts and disbursements, with the amount of the trust fund still remaining in his hands, but it is, in addition to such account stated, a rendering and giving up to the party entitled of the moneys and property in respect to which the accounting party is liable. The payment is a part of the accounting. * * * The surrogate has authority to compel the guardian to account, which includes the payment of any sum which may be found in his hands, and necessarily implies power to make the necessary order or decree in the premises."

The good sense of these remarks is conspicuous, and they are as true in regard to our orphans' court, with its present powers, as to the surrogate's court in New York. A more restricted opinion of the jurisdiction of the orphans' court was expressed in *Shepherd v. Newkirk*, 20 N. J. Law, 343, 21 N. J. Law, 302; but that was predicted upon a lack of statutory authority to render effective judgments, and to enforce decrees, which has been since amply supplied. Under the existing statutes, the court is sufficiently equipped to make and execute whatever decrees justice may dictate. Considering, then, that the orphans' court may require the guardian to pay to the ward the balance found upon the accounting, it would seem that such balance must cover all the dealings of the guardian with the estate up to the time of the accounting, as well after as before the ward's majority; otherwise the guardian might be compelled to pay again what the ward had already received. We therefore are of opinion, in the present case, that the guardian was entitled to show before the orphans' court

that what remained of the ward's estate, when she came of age, had subsequently been expended by the guardian for the ward's maintenance, with her consent. Such expenditure was tantamount to payment directly to the ward. So far, then, the decree of the ordinary, concerning the allowance claimed for maintenance after the ward became of age, is erroneous, and the decree of the orphans' court is right. But the orphans' court entertained jurisdiction of the charges made by the mother against her daughter for the latter's support after her majority, beyond the estate in the mother's hand as guardian. This, we think, was without authority. When the daughter had reached full age, the mother, as guardian, certainly did not owe

her the duty of support, and the obligations of the guardianship could relate only to the property remaining in the guardian's hands. On accounting fully for that property, the guardian's duties, as such, and the rights of the ward against her, were at an end. So, also, was the jurisdiction of the orphans' court, which could take lawful cognizance of those rights and duties only. Our conclusion, therefore, is that the decree of the ordinary, so far as it disallows the appellant's charge for board and maintenance during the minority of the respondent, and after her majority up to a period when it will exhaust the funds in the hands of the guardian, should be reversed. In other respects it is affirmed. Reversed unanimously.

SHOCKLEY et al. v. SHEPHERD.

(32 Atl. 173, 9 Houst. 270.)

Superior Court of Delaware. Oct. Term, 1891.

Action in a justice court by Joseph B. Shepherd for use of his son Alex. Shepherd against Elias Shockley and his minor son, David Shockley. There was a judgment for plaintiff and defendants appealed.

A. P. Robinson, for appellants. G. W. Cullen, for respondent.

COMEGBYS, O. J. (charging jury). This seems to be a very simple case. It is an action brought by the respondent here to recover damages for a collision that occurred on the highway in Cedar Creek hundred, this county, and alleged on the part of the respondent to have been caused by the reckless driving of one of the defendants in this case, who is the son of the other defendant. I desire to say to you now, lest I may forget it, that if it has been proved to your satisfaction by the testimony given that this collision was caused by the reckless, willful act of the son, the father would not be liable at all. The father is liable for all the wrongful acts of his son which are committed while the son is in the father's service and acting in that capacity as his agent at the time; and for all carelessness or negligence or anything of that kind, then, the master, or father here, would be liable; but for any willful act not performed in the service of the master, the employer, or the father, they would not be liable. So, if you believe, according to testimony in this case, a verdict ought to be rendered for the respondent here (who was the plaintiff below), that verdict ought to be against David Shockley, and not the father.

Now the question is whether any verdict ought to be rendered against him at all. That is a matter for you to decide when you have listened to what I have to say about the law of travel upon the public road. The law of this state is, and has been for a long time, that when two persons driving upon the public road are approaching each other, each shall keep to the right; then there will never be a collision between them. A man driving along the highway in the proper way will not be obliged to get out of the way of the party whom he is meeting. It is the duty of that person to keep on his side of the road, and not to drive the other person from the side of the road he is to occupy. The respondent in this action was on the right-hand side of the road,—just exactly where he ought to be,—and while he was driving along with his horse in a walk, according to the testimony of the young lady with him (now his wife), he discovered these vehicles approaching on

the same side of the road that he was on (where they had no business to be at all), and seeing that they were on his side of the road, he did what a great many people would not have done,—that is, he varied from the legal and appropriate course that he was taking at the time so far as to get into the fence as close as he could, in order to avoid this collision, exercising thereby extraordinary care on his part. According to the testimony, these people who were coming towards him could see him a distance of 30 or 40 yards, but they still kept on the same side of the road, probably trusting that the respondent would go away from the track where he had a perfect right to be. He, apprehending danger, saw proper to give warning, which Mr. Morgan, who was in the vehicle ahead, says he heard; and he responded to that warning cry and turned out, but the other party did not do it; for, if he had turned out, this collision never would have happened. According to the testimony, there is exactly the case before you,—one man on the right-hand side of the road, where he had a right to be and where the law says he should be when vehicles are passing, endeavoring to get as far from the approaching team as he possibly could to avoid collision, and the other person coming up to him driving along the road at a very fast pace (eight or ten miles an hour, and not shown to be less than eight miles), and that in the evening, an hour after sunset. When this is connected with the fact that the driver was on the wrong side of the road, it shows an act of willful negligence on his part, and of course he must be responsible for all the consequences which resulted from this recklessness.

If you believe the testimony produced on the part of the respondent in this case, he is entitled to recover whatever damages have been proved to you to have been sustained by him; and I will state to you that the testimony on the part of the respondent is corroborated by the testimony of the witness Mills, who was in the vehicle which came into collision with that of the respondent. I can see no good ground for any defense in this action whatever, as it seems to be a case where there was gross carelessness on the part of this driver, in consequence of which the other person, who was attempting to keep out of the way, was run into and injured. So I repeat that, if you are satisfied with the testimony on the part of the respondent, he is entitled to recover such damages against young Shockley as he has proved he has sustained; if you are not satisfied with this testimony, of course your verdict should be in favor of the appellant.

Verdict in favor of the respondent for \$15 damages.

DEAN v. STATE.

(8 South. 88, 89 Ala. 46.)

Supreme Court of Alabama. June 9, 1890.

Appeal from city court of Montgomery.

Defendant was indicted for, and convicted of, an assault and battery on a child six years old. It appeared that the child's father had deserted his family, and that defendant, who was living with the family, was authorized by the child's mother to punish and correct it. The testimony of one W. D. Cheatham, a policeman, who saw and examined the child a few hours after the whipping, as to whether the child was permanently injured, was excluded by the court on the ground that the witness was not an expert. In answer to a showing for a continuance by defendant, it was admitted that the child's mother, if present, would give certain testimony. The defendant introduced a witness who testified as to the evidence given by the mother of the child on a former trial of the defendant for the same offense, before the recorder's court of the city of Montgomery; and the court thereupon required him, on motion of the solicitor for the state, to elect whether he would retain the admission as to the testimony of said witness contained in the showing for a continuance, or his proof as to her testimony before the recorder. The court charged the jury as follows: "If one standing in loco parentis inflicts corporal punishment on a child, greatly excessive in its severity, all the circumstances considered, he commits an unlawful act, whether the injury be permanent or temporary. Malice is not a constituent element of this offense any more than in other assaults and batteries; neither is it necessary for the state to prove that the punishment was inflicted with a malicious purpose, as contended by the defense. If malice is to be made the criterion of this offense, it would, in a great measure, withdraw from children the protection of the law. It is enough that the punishment was inflicted, and was, under all the circumstances, unreasonably and immoderately severe; and whether it was so must, in each instance, in the nature of things, be left to the enlightened consideration of the jury."

Sayre & Pearson, for appellant. W. L. Martin, Atty. Gen., for the State.

SOMERVILLE, J. The law of this case is fully settled by the principles declared in Boyd

v. State, 88 Ala. 169, 7 South. 268. We there held that one standing in loco parentis—exercising the parent's delegated authority—may administer reasonable chastisement to a child or pupil, to the same extent as the parent himself. The parent is not criminally liable in all cases merely because, in the opinion of the jury, the punishment inflicted is immoderate or excessive. More than this is requisite to fasten upon him the guilt of criminality. He must not only inflict on the child immoderate chastisement, but he must do so malo animo,—with legal malice or wicked motives; or else he must inflict on him some permanent injury. If there be no permanent injury inflicted, or if no legal malice can be inferred, no conviction can follow. This is the necessary result of the rule that the parent, as to such matters of discipline, exercises pro hac vice judicial functions within the bounds above stated.

In determining the question of the reasonableness of the correction, or the existence of malice, the jury may consider the nature of the instrument used, and all the other attendant circumstances. The authorities bearing on these points are more fully discussed in Boyd's Case, *supra*. The rulings of the court are clearly opposed to these views, and for this reason the judgment must be reversed.

Whether the injury inflicted on the child was permanent in its nature was a matter as to which no one could give a mere opinion, admissible in evidence, other than a physician or like expert. The court did not err in excluding the opinion given by the witness Cheatham on this subject.

We perceive no error in the action of the court compelling the defendant to elect, on the one hand, between the introduction of the written statement made as a showing of what the absent witness would swear to if present, and, on the other, of the secondary testimony of such witness as to the same matter given on a former trial before the recorder's court. The former was original evidence, and the latter was secondary, admissible only on the ground of necessity to prevent the defeat of justice. The written statement, being a substitute for the oral evidence of the absent witness, would seem to be the only competent evidence of the two. There is nothing, therefore, in this ruling of the court of which the defendant can complain. Reversed and remanded.

UNITED STATES v. GREEN.

(Fed. Cas. No. 15,256, 3 Mason, 482.)

Circuit Court, D. Rhode Island. Nov. Term, 1824.

Habeas corpus upon the petition of Aaron Putnam, a citizen of New York, against Timothy Green, a citizen of Rhode Island, to bring up the body of Eliza A. Putnam, an infant daughter of Putnam, about ten years old, alleged to be wrongfully detained in the custody of the defendant, who was her grandfather. Upon the execution of the writ, a special return was made by the defendant, alleging, that the infant was the child of his daughter Mary, who married Putnam, and had since deceased; that in 1817, Putnam became embarrassed, and brought his wife and the said infant to reside at his house in North Providence, where they lived for two years; that they were subsequently removed to Connecticut, and again came back to his house with the consent of Putnam; that the wife died in his family in 1820, and upon her death-bed requested her parents to keep and bring up the said infant as their own; that they promised accordingly so to do: that the infant had ever since, until within a few months, resided in his family, and she was then placed by them in the Friends' Seminary at Providence for education; that he called at that seminary this morning to see her, and then understood she was not there, and the superintendent did not know where she was, or how she went away; that the infant never had been under any restraint, but was at all times at perfect liberty in his family; that she had a great unwillingness to go away and live with her father; and "that neither at the coming of the writ to him, nor at any time since, has the said Elizabeth (the infant) been, nor is she now in his power, possession, custody, or control."

Upon this return, Elisha Williams, for the petitioner (Putnam), moved for an attachment against the defendant, grounded upon the insufficiency of the return. He argued, that the defendant had not answered the exigency of the writ; that the return was evasive and did not state all the facts within the knowledge of the defendant, who had spirited away the infant to avoid the process; that an attachment in such cases was the proper process. 5 Term R. 89; 10 Johns. 328.

Cozzens & Hunter, for defendant *e contra*, argued, that the return was full and direct, and not evasive; that it was in the very terms of those returns, which courts of law had held sufficient; that a writ of habeas corpus only issues in cases of coercive restraint of a party in the custody of another. Here, there was no restraint, and the defendant had stated his inability to produce the infant in the fullest terms. He ought therefore to be discharged from farther inquiry and process. 5 Term R. 89; 3 Bac. Abr. "Habeas Corpus," p. 436; 13 Johns. 418.

STORY, Circuit Justice. In cases of this nature the court will look into all the facts stated in the return, and ascertain if they contain a satisfactory statement, upon which the party ought to be discharged. It will not discharge the defendant, simply because he declares, that the infant is not "in his power, possession, control, or custody." If the conscience of the court is not satisfied, that all the material facts are fully disclosed. That would be to listen to mere forms against the claims of substantial justice, and the rights of personal liberty in the citizen. In ordinary cases, indeed, such a declaration is satisfactory, and ought to be decisive, because there is nothing before the court upon which it can ground a doubt of its entire verity, and that in a real and legal sense the import of the words "possession, power, or custody," is fully understood and met by the party. The cases of *Rex v. Winton*, 5 Term R. 89, and of *In re Stacy*, 10 Johns. 328, show with what jealousy courts watch the terms of returns of this nature. See, also, *Ex parte Eden*, 2 Maule & S. 226. In those cases there was enough on the face of the return to excite suspicions that more was behind, and that the party was really within the constructive control of the defendant. Upon examining the circumstances of this case, I am not satisfied, that the return contains all those facts within the knowledge of the defendant, which are necessary to be brought before the court, to enable it to decide, whether he is entitled to a discharge, or, in other words, whether he has not a power to produce the infant, and control those in whose custody she is. There is no doubt, that an attachment is the proper process to bring the defendant into court. But suppose he were here, the next step would be to require him to purge his supposed contempt, and to answer interrogatories. That is the very object of the present motion. But an attachment can be necessary only when the party is not present in court. The defendant is now personally present, and the court may directly make an order, that he shall answer further interrogatories to be drawn up at the bar. It is wholly unnecessary to go a circuitous route, when there is a direct path open before us. I shall therefore make an order to this effect. Order accordingly.

Upon this order the defendant answered a series of interrogatories put by leave of the court in writing to him. These, however, being still unsatisfactory to the plaintiff,

E. Williams, in his behalf, moved for an attachment, which motion was opposed by Cozzens & Hunter, for defendant. Upon this motion, a wide discussion arose as to the right of the father to have the custody of the infant under the circumstances of the case.

STORY, Circuit Justice. As to the question of the right of the father to have the custody of his infant child, in a general sense

It is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant; and if the infant be of sufficient discretion, it will also consult its personal wishes. It will free it from all undue restraint, and endeavour, as far as possible, to administer a conscientious, parental duty with reference to its welfare. It is an entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody. The case of *Rex v. De Manneville*, 5 East, 221, is not inconsistent with this doctrine; but on

the other hand supposes its existence. The court there thought it for the interest of the child to give the custody to the father. The judges thought there was no reason to suppose the father would abuse his right, or injure the child. Lord Eldon, in *De Manneville v. De Manneville*, 10 Ves. 52, avowed his approbation of the doctrine, and said, he had, exercising the authority of the king, as *parens patriæ*, removed children from the custody of their father, when he thought such custody unsuitable. The case of *In re Waldron*, 13 Johns. 419, is directly in point; and to the same effect is *Rex v. Smith*, 2 Strange, 962. My judgment follows these cases without hesitation.

The cause lay over until the next morning, when the parties entered into a specific agreement, as to the custody of the infant, which, being sanctioned by the court, was by the consent entered of record. Whereupon further proceedings were stayed.

CLAY v. SHIRLEY.

(23 Atl. 521, 65 N. H. 644.)

Supreme Court of New Hampshire. Hillsborough. June Term, 1874.

Case reserved from Hillsborough county.
 Action for wages. Plaintiff, when 12 years old, was employed by defendant under an agreement with plaintiff's grandfather to board, clothe, and school plaintiff, and, if he remained till of age, to give him \$150. Plaintiff's mother authorized the bargain. Prior to his employment plaintiff's father had deserted his family, and has never since supported plaintiff, nor exercised any control over him. Verdict for plaintiff for \$102.91. Case reserved. Judgment on verdict.

Briggs & Huse, for plaintiff. Morrison, Stanley & Hiland, for defendant.

FOSTER, J. If a father obliges a child to support himself, there is no principle but that of slavery which entitles him to the child's wages. Schouler, Dom. Rel. 345; Nightingale v. Withington, 15 Mass. 274. If the father deserts and abandons his family, exercises no control over them, interferes with them in no way, manifests no interest in their welfare, and does not communicate with them, the relation of master and servant is dissolved, and the principle of slavery no longer sustains the father's right to his child's wages. It is as if the father were dead, and the custody of the child and the right of appropriation of its wages were thereupon devolved upon the mother. Emancipation is not to be presumed. It is a question of fact. Emancipation may be implied from circumstances, and may be inferred from the conduct of the parties interested. Wells v. Kennebunk, 8 Me. 202; Abbott v. Converse, 4 Allen, 533; 1 Cooley, Bl. Comm. 453, note 13; Dennysville v. Trescott, 30 Me. 473; Lisbon v. Lyman, 49 N. H. 553. If a father allows his son to go from him, and employ himself as he pleases, and take his wages, it is a qualified emancipation. Woodell v. Coggeshall, 2 Metc. (Mass.) 92. If the father is dead, or if he has deserted his family, the mother stands in loco patris, and she is entitled, in such case, to the earnings of her minor child. Lubec v. Eastport, 3 Me. 220; St. George v. Deer Isle, Id. 390; Freto v. Brown, 4 Mass. 675; Kelley v. Davis,

49 N. H. 187. But she also may emancipate him; and this emancipation may be inferred from circumstances and conduct. In Wells v. Kennebunk, after the desertion of his father, the child lived in his grandfather's family. The mother did not contribute to his support, nor control his conduct, nor receive his wages. Said Mellen, C. J.: "She seems to have resigned him to the care, government, and protection of the grandfather. The language of her conduct seems to be plain, and not to be misunderstood. The conduct of the child seems to speak a similar language. He has not followed her, or sought her aid, or submitted to her control. Considering all the circumstances of this case, we are led to the conclusion that the child must be considered as having been emancipated." The circumstances of that case are not so clearly indicative of that conclusion as those of the present, and we think it must be held that the plaintiff was emancipated by his mother. After four years' service, the boy, of his own accord, left the employment of the defendant in November, 1870, at which time, according to the verdict of the jury, the defendant was indebted to somebody for the boy's labor, over and above what the boy had received, in the sum of \$102.91. Two years elapsed before this suit was brought; and during all that time neither the father nor the mother nor the grandfather has ever made any claim, nor does either of them now make any claim, to recover the child's wages; nor, so far as we are informed, has either of them attempted in any manner to control his person or his conduct, or to interfere with the prosecution of this suit. It would be difficult to conceive of a clearer case of implied, but unquestionable, emancipation. This boy, deserted by all the world, has a right to earn and enjoy, as best he may, his own living; and the defense set up here,—that, if the boy claims his wages, they belong to his mother; and, if his mother claims them, they belong to his father; and, if his father claims them, they belong to his grandfather; and, if his grandfather claims them, they belong to the father, or the mother, or the defendant,—anybody but the boy,—comes with a very poor grace from the party who has received the plaintiff's services without rendering an equivalent for them. Judgment on the verdict.

PLUMMER v. WEBB et al.

(Fed. Cas. No. 11,234, 1 Ware [75], 69.)

District Court, D. Maine. June Term, 1825.

This was a libel filed by Moses Plummer against the respondents, the master and first and second mates of the brig Romulus, for various assaults and batteries alleged to have been made on John S. Plummer, the minor son of the libellant. It was proved at the hearing that Michael Webb, the master, received the son on board the vessel at the father's request; that he was to serve without wages, and perform such services as were proper for a boy of his age, being twelve or thirteen years old, and that in consideration of his services the master should instruct him in the duties of a seaman. It was the understanding at the time, that the vessel should perform a double voyage before her return to this port, that is, should make two voyages to Europe, and that the boy was to remain with the vessel until her return to this place. On his return here, the owners might pay him such wages as his services were thought to be worth, but they were not bound to pay any. One voyage was performed to Liverpool and back, by the way of Savannah, to New Orleans, where the brig lay a considerable time waiting for freight. Soon after leaving New Orleans, on her second voyage to Liverpool, the boy sickened and died, in consequence of the beating and ill usage he had received. The libel charges several batteries during this period, and several are proved against the first mate, but no evidence was offered implicating the second mate, nor was any instance of beating brought home directly to the master. It was contended for the libellant that the evidence disclosed such a criminal negligence and inattention on the part of the master in suffering a boy of his tender age, who was placed in a peculiar manner under his protection, to be repeatedly beaten by his first officer, that for this negligence he ought to be held as a joint trespasser; that it is the duty of the master, in all cases, to protect the men under his command from the abuse of his subordinate officers, and that this obligation in the present case was enhanced by the peculiar circumstances of trust and confidence under which the boy was placed in his charge.

C. S. Davis, for libellant.

Feasenden & Deblois, for respondents.

WARE, District Judge. Several questions of law have been raised and discussed at the bar, which require to be disposed of before we can arrive at the merits of the case, as disclosed in the evidence. They have been urged as a bar to the libellant's right to recover against either of the respondents, under any state of facts which can exist.

It is contended, in the first place, that the father cannot maintain an action, because

the tort, as alleged in the libel, amounts to a felony, and that the private wrong is merged in the public crime; and in the second, that if any right of action ever existed, it is extinguished by the death of the son before the commencement of the suit. The case of Higgins v. Butcher, Yel. 90, is relied upon as an authority at common law, directly in point. That was an action brought by the husband for the battery of his wife. The battery was the cause of her death, and the action was brought after her decease. It was ruled that an action for a personal tort, done to the wife, did not lie for the husband alone, but the wife must join; and the damages being recoverable for the benefit of the wife, the right of action died with her, and did not survive for the husband. It is further added, that if a man beat the servant of another so that he die of the extremity of the beating, no action will lie for the master, because the private wrong is swallowed up and lost in the public offence.

The doctrine here stated, of the merger of the private wrong and civil remedy in a public crime, was an ancient principle of the common law, and seems to result as a natural and logical consequence flowing from the fundamental principles of the feudal system. Under that system, all property, or at least all landed property, was assumed to belong to the sovereign and superior lord. The grants which were made to private persons did not convey the absolute property, but only a usufructuary interest, and this was granted upon condition. If the conditions were not performed, this interest was forfeited, and the land reverted to the grantor, in whom the ultimate proprietary right had continued to reside. Wright, Ten. c. 1. One of the conditions implied in every feudal grant was that the tenant should not commit felony. The commission of a felony was therefore a forfeiture of the whole of the feudatory's interest in the grant. 2 Bl. Comm. 153. The common law extended this forfeiture to his goods and chattels, as well as his lands. There would therefore be no remedy which could reach the real estate of the wrongdoer, because all the interest which he had in that, ceased from the moment that the offence was committed, and reverted to the donor. And as to his personal estate, a species of property of little consideration in the early ages of the common law, the title which the crown acquired by forfeiture took precedence of any claim which a private person might have to damages to be recovered against the party. The forfeiture extending to the whole property of the felon, and the crime being capital and punished by death, nothing remained to satisfy a private demand, and no person against whom the action could be brought. The private action was therefore necessarily gone, or as it is usually expressed, the private wrong was merged in the felony. But these principles have never been adopted in this

state. There is with us no forfeiture of goods resulting from felony, nor are all felonies punished by death. In this state, therefore, an action may be maintained for the private wrong, although the act which is the foundation of the suit amounts to a felony. *Boardman v. Gore*, 15 Mass. 331. This doctrine of the merger of the civil remedy in the public crime, which is a natural and logical consequence of the fundamental and organic principles of feudal society, is entirely in opposition to the system of civil polity established in this country. And modern decisions in England have overruled the old cases on this point. The case of *Crosby v. Leng*, 12 East, 409, shows that an action may be maintained for a wrong amounting to a felony after the party has been convicted or acquitted of the public offence, provided the acquittal is not obtained by collusion. As to the other point ruled in the case cited, if the meaning be that the husband cannot recover damages for the mere personal wrong to his wife, it may be true; but if the meaning be that an action will not lie in his name alone for consequential damages, as for the loss of her services and society, and the expenses of her cure, however the law may have been formerly, I understand the contrary to be now well established. 3 Bl. Comm. 140; Chit. Pl. 61; Com. Dig. "Baron and Feme," W; Cro. Jac. 538.

But whatever may be thought of the law of that case, its application to the case at bar is not admitted. It is not questioned that an action does lie for the parent for a battery of his child. It is, however, contend-ed that it does not lie after the death of the child which is the subject of the tort.

The private injury resulting from an assault and battery may be regarded under a twofold aspect. First, the direct and immediate personal injury, the bodily pain and suffering occasioned by the beating, and the mental anguish and humiliation resulting from the disgrace of being beaten. Secondly, the collateral or consequential injury, the loss of labor and service, and the expenses of cure which may be occasioned by the severity of the battery. The first wrong necessarily spends itself on the individual who is the subject of the battery, and as he is the only sufferer, upon the first principles of natural justice he only is entitled to the amends. For this damage, the husband cannot sue alone, because it is naturally due to his wife. But as, by the principles of the common law, the wife is not permitted to sue in her own name alone, she shall be joined in the action by her husband, or, to speak more correctly, the husband shall join in her action, because it is prosecuted for her benefit, and the damages survive to her use if the husband die before they are recovered. Com. Dig. "Baron and Feme," V; *Russel v. Corne*, 1 Salk. 119, 2 Ld. Raym. 1031; 1 Chit. Pl. 61. The second falls on the person who is entitled to the labor and service of the person who is

the subject of the battery, and who is bound for the expenses of his cure. For this loss, the law gives him an action for damages. The death of the child or servant through whom the injury is done, before the commencement of the suit, if it is a consequence of the battery, aggravates the injury; if the death is occasioned by other causes, it leaves it as it stood before. It neither enhances or diminishes the loss. It is not easily perceived upon what principles of natural right the remedy should be taken from a party by an event which he could not control, and which leaves his rights unimpaired and his wrong unredressed. The case of *Winsmore v. Greenbank*, Bull. N. P. 78, is an authority to show that the death of the person through whom the injury was done, before the commencement of the suit, is not a bar to the action.

But if the parent's right of action is not extinguished by the death of the child before the commencement of the suit, it is material to inquire what damages he can recover in an action in his own name, or what damages he is entitled to in his own right. The natural and obvious answer to the inquiry is, that he can recover such damages as he has sustained in consequence of the wrong. And it is upon this ground that the law places the action. Its foundation is the loss of service, and it is so stated in all the authorities. But it seems to have been assumed at the argument that, although this is the ground of the action, or the material circumstance which enables the court to render a judgment for damages, yet that the court, having a legal ground for sustaining the judgment, may proceed to award damages beyond the loss of service and for causes which would not of themselves support an action in the parent's name. The action was likened to an action of trespass by the parent for the seduction of his daughter. This also has its foundation in the loss of service, and will not lie without a per quod servitium amisit. But in point of fact, the service, in the estimate of damages, is merely nominal. If the child is a minor, it is assumed as a presumption of law that she is a servant. No service need be proved, nor is it necessary, to support the action, that she should be an inmate of her father's family. *Martin v. Payne*, 9 Johns. 387. And if she be over twenty-one and lives in her father's family, the slightest acts of service are sufficient to support the heaviest damages. *Reeve, Dom. Rel.* 291, 292. The allegation of loss of service is necessary to let in the action, but the substance of the wrongs for which damages are awarded is the disgrace, and humiliation, and wounded feelings of the family; wrongs for which the law gives no remedy, unless they are tacked to a nominal or fictitious menial service. The law, in this case, allows a deviation from strict logical principles, in the interest of good morals; for in cases of seduction, unless the parent could recover dam-

ages no recovery could be had, and the heartless depravity of the cold-blooded destroyer of the peace of families would escape unpunished. The suit of the child is answered by the maxim, "Volenti non fit injuria." She is particeps criminis, and the law will allow her no action, the foundation of which is laid in her own turpitude. But in the case of an assault and battery, the law is different. The parent and child may each have their distinct action for their separate wrongs. The loss of service falls on the parent, who is entitled to the labor of his child, and for this the law gives him a remedy by an action. But the wrong which is merely personal, the pain and anguish of body and mind, are the injuries of the child, which he only can feel, and for which he is entitled to his separate action, and the damages are recovered for his benefit. The damages of the parent or master, and of the child or servant, are in their nature several and distinct, and a recovery by one is no bar to an action by the other. Reeve, Dom. Rel. 876; Gray v. Jefferies, Cro. Eliz. 55.

Can the parent, then, upon the facts of this case, maintain an action for the loss of the services of his child? The child was not living in his father's family. He was placed by the parent in the custody of one of the respondents as a servant, who, by the parent's agreement, at the time of the several assaults complained of, was entitled to his services, so that if there was any loss of service, it did not, in this case, fall on the parent, but upon the master, who for the time had succeeded to his rights in this respect. Had the battery been committed on the boy by any other person than one of the ship's crew, by which he should have been rendered incapable of

doing duty during the period included in the agreement, no doubt can be entertained that the master could have recovered damages for the injury. The rights of the master in this respect are as well established as those of the parent. But if the master could have maintained an action, this would necessarily have excluded the action of the father for the same cause. Considering the suit as an action for the loss of service,—and on no other ground can it be maintained,—my opinion is that it cannot be sustained.

As against Mr. Merritt, the second mate, it is dismissed with costs. There is no part of the evidence which attaches any blame to him. With respect to the master and first mate, it is dismissed without costs. There can be no doubt upon the evidence, that the boy was unreasonably beaten, and if he were alive to prosecute the suit for his own wrongs it would be a clear case for damages. There is indeed no direct proof that he was beaten by the master. But it was the master's duty to protect him from the violence of his subordinate officers. I do not admit the correctness of the argument of the counsel for the respondents, that the master in this form of action, is not liable for non-feasance. It is his duty to interpose his authority for the protection of all his men from the intemperate violence of his inferior officers, and if he suffers them to be ill-treated he ought to be held as a joint trespasser. He is intrusted by the law with the supreme power on board of his ship, and what is done by his permission must be considered as done by his authority. In the present case, the obligation to protect this boy was particularly strong, because he was placed in his care under peculiar circumstances.

CULP et al. v. WILSON.

(32 N. E. 928, 133 Ind. 294.)

Supreme Court of Indiana. Jan. 5, 1893.

Appeal from circuit court, Elkhart county; J. M. Vanfleet, Judge.

Action by Miranda Culp and others against Harvey C. Wilson, as administrator of their father's estate, to recover their respective shares of their father's estate.

Dodge & Dodge, for appellants. H. D. Wilson and W. J. Davis, for appellee.

COFFEEY, C. J. On the 20th day of October, 1890, the appellee, Harvey C. Wilson, as administrator of the estate of Samuel Kessler, deceased, filed his final report, in which was shown a balance of \$1,411.68 on hand for distribution among the heirs of the deceased. In this report it was stated by the administrator that he had been credibly informed that the deceased, in his lifetime, had advanced the appellants, his three daughters Isabelle P. McDowell, Miranda Culp, and Ann Shupert, in land, of the value of \$3,000 and upwards, more than he had advanced and paid to his daughter Amanda Lutz. The appellants appeared, and filed such pleadings as were necessary to make an issue upon this statement, which issue was tried by the court, resulting in a finding and judgment in favor of Amanda Lutz. From the finding and judgment of the court this appeal is prosecuted.

It is contended by the appellants that the finding of the court is not sustained by the evidence, the proof showing that such sums as were received by the appellants were gifts, and not advancements. In the bill of exceptions containing the evidence we find the following admissions: "It is admitted by the parties hereto that each of the heirs of Samuel Kessler, except Mrs. Lutz, received from their father, Samuel Kessler, during his lifetime, land to the amount of more than the amount of funds in the hands of the administrator for distribution." Other evidence in the record tends to prove that the land received by each of the appellants was worth near \$4,000. In *Ruch v. Blery*, 110 Ind. 444, 11 N. E. 312, it was said: "An advancement, in legal contem-

plation, is the giving by a parent to a child, by way of anticipation, of the whole or a part of that which it is supposed the child will be entitled to on the death of the parent or person making the advancement." A voluntary conveyance of land by the parent to one of his children is presumed to have been intended as an advancement, and the burden of showing that it was not so intended rests upon the person who asserts it to be anything else. So, when it becomes necessary, in a case involving the question of advancement, to ascertain the intention with which a donor conveyed property, so long as there is no satisfactory evidence to the contrary, the law, looking to the relationship and rights of others, will ascribe to the donor that intention most favorable to an equal distribution of his property among all his children. *Ruch v. Blery*, *supra*; *McCaw v. Burk*, 31 Ind. 56; *Dille v. Webb*, 61 Ind. 85; *Parks v. Parks*, 19 Md. 323; *Clark v. Willson*, 27 Md. 693; *Dutch's Appeal*, 57 Pa. St. 461. When it was shown by the appellee that the appellants had received from their father land of greater value than the amount in his hands for distribution, he had made out his case. No further proof on his part was required. It cannot be said, therefore, that the evidence in the cause does not tend to support the finding of the circuit court. The proof by which it was sought to destroy the case made by the appellee consisted of declarations made by the deceased at a time remote from the trial, and is not of a very satisfactory character. Evidence of declarations is generally considered a weak class of evidence, by reason of the fact that the party making them may not have clearly expressed his meaning, or may have been misunderstood, or the witness, by unintentionally altering a few words of the expressions really used, may give an effect to a declaration completely at variance with what the party did actually say. The weight to be given to declarations proven by the appellants was wholly for the circuit court; and, as it reached the conclusion that they were not sufficient to overcome the case made by the appellee, we cannot, under the well-known rules of this court, interfere with such conclusion. Judgment affirmed.

BEAKHUST et ux. v. CRUMBY et ux.

(30 Atl. 453, 18 R. I. 689.)

Supreme Court of Rhode Island. July 30, 1894.

A bill for partition by George Beakhust and Elizabeth Beakhust, his wife, against Hilton Crumby and Emma Crumby, his wife. Hilton Crumby died after the filing of the bill, and it was amended by making it a bill against Emma Crumby alone. The complainant Elizabeth Beakhust and the deceased, Hilton Crumby, were the children and heirs at law of Mary Crumby, who died intestate. Heard on pleadings and proof.

Darius Baker and Charles Acton Ives, for complainants. William P. Sheffield, Jr., and Michael W. Callaghan, for respondent.

MATTESON, C. J. This is a bill for partition. After the filing of the bill, and before it was answered, the respondent Hilton Crumby died, on, to wit, July 3, 1893, leaving a last will and testament, duly admitted to probate, in which he gave all his estate to his widow, Emma Crumby, the other respondent. The bill was subsequently amended by setting forth the decease of Hilton Crumby, and by making it a bill against Emma Crumby alone. The complainant Elizabeth Beakhust and Hilton Crumby were the children and heirs at law of Mary Crumby, late of Newport, deceased, who died intestate on July 9, 1892. The complainants claim that the estates in the lands of which partition is sought, conveyed to Hilton Crumby by deed from Mary Crumby, dated August 25, 1883, and a deed from John Oman and Lucy Oman to him and Mary Crumby, dated January 28, 1884, are to be regarded in making the partition as advancements to Hilton from Mary,—the first, because the deed by which it was conveyed was a deed of gift, and, consequently, under Pub. St. R. L. c. 187, § 20, an advancement. The section is as follows: "If real estate shall be conveyed by deed of gift, or personal estate shall be delivered to a child or grandchild and charged, or a memorandum made thereof in writing by the intestate or by his order, or shall be delivered expressly for that purpose in the presence of two witnesses, who were desired to take notice thereof, the same shall be deemed an advancement to such child, to the value of such real or personal estate." The estate conveyed in the second deed is claimed to have been an advancement, because the purchase money was paid out of moneys which had been deposited, and stood at the time, in the name of Mary Crumby. We do not think that the estates so conveyed are to be regarded as advancements. The deed from Mary Crumby to Hilton Crumby does not purport to be a deed of gift, but is expressed to be in consideration of the payment by Hilton to Mary of \$3,500, which was approximately, we presume, the value of the interest conveyed.

The presumption from such a deed is, in the absence of proof to the contrary, that it was made for a valuable consideration, rather than as a gift, or as provision by way of advancement for the benefit of the grantee. The complainants contend that, as it is admitted in the answer that no consideration passed at the time of the conveyance, it must be regarded as a deed of gift within the meaning of the statute. We do not think that it necessarily follows that because no consideration passed at the time of the conveyance it must be regarded as a deed of gift within the meaning of the statute. Mary Crumby and Hilton Crumby having both deceased, the condition of affairs which led to the conveyances can only be ascertained from the facts proved by the testimony of others. The evidence shows that Hilton, at the time of his death, was 48 or 49 years of age; that early in life he learned the trade of a carpenter; that he was of industrious habits, working whenever work was obtainable, and, when not employed elsewhere, caring for and repairing and improving the property in suit; that he had average skill in his calling as a carpenter, and earned from two dollars to two dollars and a half a day; that he was frugal in his expenditures; that after attaining his majority, as well as before, and down to the time of his mother's death, he turned over his earnings to her, which were used by her, or deposited by her with her own moneys in the savings bank. It thus appears that at the time of the conveyances in question, Hilton Crumby, who had worked steadily at his trade as a carpenter, and had earned upwards of two dollars a day during such portions of the time as he was able to obtain work, for a period of 17 or 18 years after becoming of age, and without remuneration, except his maintenance, had turned over his earnings to his mother, and had besides done considerable work in caring for, repairing, and improving her property. We think that it is not only fairly inferable, but it is highly probable, from this state of facts, that Mrs. Crumby may have regarded herself as in some sense a custodian or trustee for her son of the moneys she had thus received, or that, at any rate, she felt that it was no more than just that she should remunerate him for the benefits she had received from him, and that she may have made her own conveyance, and took that from the Omans to her son as well as to herself in discharge of the obligations which she felt resting on her towards her son. *Murrel v. Murrel*, 2 Strob. Eq. 148, was a case in which lands had been conveyed by a father to his two eldest sons as a remuneration for labor performed for him by them while minors, when he was very poor, and for their assistance in laying the foundation of his subsequent fortune, and in fulfillment of promises held out to them as inducement to their great exertions in his behalf. It was held that though

a father is entitled to the services of his children while they are under age, he may waive that right, and make their services the consideration of a contract or promise, and may give property bona fide in performance of such obligation of justice, without its being subject to any claim on the part of other children to consider it in the light of an advancement, and that lands so conveyed were not to be deemed advancements within the meaning of the statute then in force relating to advancements. The chancellor uses this language in his opinion: "They were not advanced (in the sense in which the statute uses the word) by these conveyances, although the lands were given to them by their father. * * * Whatever may be the accurate definition of an advancement (and it is not easy to frame one), these gifts, standing upon this consideration, do not fall within it. I suppose an advancement must stand clear of any such consideration. It may, and I suppose always does, betoken the affection borne to the child advanced. That is the motive. But here the motive was not love, but justice. The act was not a gratuity, but a voluntary compensation; 'it was not of grace, but of debt'." The case at bar is analogous to that of *Murrel v. Murrel*, for, though there is no express declaration or promise of remuneration to her son shown on the part of Mrs. Crumby, which could

hardly be expected, since both she and her son are dead, and the conveyances were made upwards of 10 years prior to the filing of the bill, it is scarcely conceivable that the son should have gone on year after year turning over his earnings to his mother, and working on the property, without some understanding, express or implied, that he was, at some time or in some manner, to be compensated, or that his mother could have received his earnings and the benefit of his labor without feeling that justice required her to make compensation. By doing justice to her son, the mother did no injustice to her daughter, who, as heir at law with her brother, is entitled to her share of the property which justly belonged to the mother. If the conveyances were made as they were from a sense of justice, or in pursuance of some promise or declaration on the part of Mary Crumby to Hilton Crumby to remunerate him, as we think is more reasonable and probable than that they were mere gifts or by way of advancements, then, under the authority of *Murrel v. Murrel*, supra, they are not to be deemed advancements in making the partition. We so find and hold. A decree of partition may be entered in conformity to the views herein expressed.

STINESS, J., nonconcurring in finding of fact.

McCOOK COUNTY v. KAMMOSS et al.
(64 N. W. 1123, 7 S. D. 558.)

Supreme Court of South Dakota. Oct. 28, 1895.

Appeal from circuit court, McCook county; Joseph W. Jones, Judge.

Action by McCook county against Edward Kammos and others. Judgment for plaintiff, and defendants appeal. Affirmed.

A. C. Biernatzki, for appellants. P. W. Scanlan, for respondent.

KELLAM, J. McCook county brought this action to recover from appellants \$100, paid by the county for the support and maintenance of their indigent father, and for a judgment requiring them to contribute to his future support. This appeal is from an order overruling a demurrer to the complaint. The grounds of demurser were: First, that plaintiff has not legal capacity to sue; second, that several causes of action have been improperly united; and, third, that the complaint does not state facts constituting a cause of action.

There is no merit in the first ground. The statute expressly authorizes a county to sue (section 572, Comp. Laws). The second ground will be noticed after the third is disposed of.

Does the complaint state facts sufficient to constitute a cause of action in favor of the county against the appellants? Section 2612 of the Compiled Laws is as follows: "It is the duty of the father, the mother and the children of any poor person, who is unable to maintain himself by work, to maintain such person to the extent of their ability." This provision innovates the common-law rule, by imposing upon children, to the extent of their ability, the duty of maintaining their poor and helpless parents. The statute declares the duty of such children to support such parents as expressly and unequivocally as the common law declares the duty of parents to support their minor children. Appellants contend that this statute declares only a moral duty, for it provides

no means for its enforcement. This may be true so far as future support is concerned, but the general law affords the same means for compelling payment for necessary support by an adult child who disregards this imposed duty as it does in the case of a neglectful father. The duty rests upon the child, but, in consequence of his neglect, the statute humanely requires the county to provide such support. The county does not act officiously, but under the coercion of the law, and supplies the support which the son or daughter was under obligation to supply. The duty to support being by law put upon the child, he is liable upon the same principle that the father is liable at common law for necessary support furnished to a destitute minor child, whom it is his duty to provide for. If, under such circumstances, the county, under the direction of the law, furnishes necessaries to the indigent and helpless father, we think, upon principle, it ought to and may recover therefor against the children whose duty it was to furnish the same, but who neglected and refused so to do. The statutes of most of the states go further, and provide a procedure by which such children may be compelled to supply future support. Ours does not. Whether the omission was an oversight or deliberate we do not know. Our conclusion is that the complaint states facts which would entitle the county to recover for the necessary support theretofore furnished the father, but we are unable to find any statutory authority for the court to make a judgment requiring the defendants to undertake the future support of their father. For such necessities as it has already furnished, or for such as, under the same conditions, it may hereafter furnish, it may maintain an action against the defendants. The complaint stating no cause of action for future maintenance, there was no misjoinder. The complaint stating one good cause of action, the demurrer was properly overruled, and the order appealed from is affirmed. All concur.

MAURO et al. v. RITCHIE.

(Fed. Cas. No. 9,812, 3 Cranch, C. C. 147.)

Circuit Court, District of Columbia. May Term, 1827.

Appeal from the orphans' court, who had removed the appellants, (who had been duly appointed guardians of John W. Ott, an infant,) and appointed the appellee, John T. Ritchie, guardian in their place.

Before CRANCH, Chief Judge, and MORSELL and THRUSTON, Circuit Judges.

CRANCH, Chief Judge. On the 13th of September, 1826, Joseph Forrest and Philip Mauro, by J. Marbury, "their attorney," applied to the orphans' court for leave to file their petition, praying that court to review its order, granting to John T. Ritchie the guardianship of John W. Ott, to whom the petitioners had been appointed guardians in the year 1821; and that the said John T. Ritchie may be cited to answer the prayer of the petitioners. Whereupon that court ordered that leave be given as prayed, and that a citation be issued against the said Ritchie, returnable to the 20th of September, 1826. The petition was accordingly filed, stating the appointment of the petitioners as joint guardians of John W. Ott; that they gave bond, &c.; that the said John W. Ott is still under age, being about fourteen years old, and still subject to their control and care; that on the 9th of August, 1825, John T. Ritchie, ("who, your orators pray, may be made defendant to this bill of review.") made application to be appointed guardian to the said orphan, and filed a letter from the said orphan, dated from Frederick city, in the state of Maryland, on the 14th of July, 1825, directed to the judge of the orphans' court of the county of Washington, in the District of Columbia, in which he represents himself to be fourteen years of age, and states that he chooses the said J. T. Ritchie as his guardian, and requests that he may be appointed. Whereupon the judge of the orphans' court, without notice to the petitioners, without having caused the orphan to be brought into court, and without further evidence, or other proceeding, by a decretal order appointed the said J. T. Ritchie guardian of the infant, which decretal order is signed and enrolled; that they are aggrieved thereby, and that it is erroneous, and ought to be reversed and annulled. And they assign for error: (1) Because the petitioners were appointed guardians under Act 1798, c. 101, c. 12, § 1, which gives the court power to appoint a guardian for an infant until the age of twenty-one, and that having exercised that power, by appointing the petitioners guardians of the infant till his age of twenty-one, it was not competent for the judge to remove the petitioners and appoint a new guardian except for cause shown, in the omission or neglect of duty, &c.; and if such neglect were alleged, the petitioners were entitled to be cited and heard. (2) Because

the infant had no right, at the age of fourteen, to choose a guardian, having had guardians appointed until he should be twenty-one years of age. (3) Because the infant was not brought into court, and under the inspection and examination of the judge; that his age, competency to choose, and wish might be distinctly known to the judge. (4) Because the petitioners were not cited to show cause why they should not be removed, and the said Ritchie appointed guardian. (5) Because the petitioners had no notice of the application and appointment of the said Ritchie until after the said order was made, and had no opportunity to object to the same. "For all which errors in the said decretal order your orators have brought this bill of review, and humbly conceive that they should be relieved therein. In tender consideration whereof, and for that there are divers errors and imperfections in the said decretal order and proceedings, by reason whereof the same ought to be reviewed and reversed, &c.; and to the end that the same may be reviewed and reversed, &c., and that the said J. T. Ritchie may answer, &c., and that your orators may be relieved according to equity and good conscience, may it please your honor to grant your orators a subpoena to the said J. T. Ritchie," &c., and they file a record of the proceedings referred to. The said J. T. Ritchie appeared on the 20th of September, 1826, and prayed further time to answer, which was given to the 27th, when he appeared by Mr. Swann his solicitor, and said, "that the bill of review, so as aforesaid exhibited against him, and the matter therein contained, are not sufficient in law to compel him to answer the said bill," &c. "wherefore for want of a sufficient bill in this case the said John prays that the said bill may be dismissed," &c. And the said Joseph and Philip, by J. Marbury their attorney, say that the bill, &c., is sufficient in law, &c. &c.

The cause having been submitted to the judge of the orphans' court, without argument, he decreed that the prayer of the petition could not be granted, and that the petition be dismissed with costs. Upon which decree the petitioners appealed to this court.

The original order, appointing the petitioners guardians, was in these words: "March 21, 1821. Catharine Ott having declined the appointment of guardian to the infant children of her son, the late Doctor John Ott, it is by the court this day ordered, that Joseph Forrest and Philip Mauro, both of said county and district, be appointed joint guardians of the said orphan children of Doctor John Ott, deceased, they entering into a bond of \$20,000, for each guardianship, with William Cooper and Hanson Gassaway securities." On the 9th of August, 1825, John T. Ritchie made application to the court to be appointed guardian to John W. Ott, and filed the following letter: "Frederick City, Frederick County, July 14th, 1825. To the Honorable Mr. Lee, Judge of the Orphans' Court for

Washington County, in the District of Columbia. Honorable Sir,—I beg leave hereby to make known to you that I am the son of Doctor John Ott, late of Georgetown, in the District of Columbia, deceased, and am above the age of fourteen years, but under twenty-one; and I do choose for my guardian, my uncle, John T. Ritchie, of Georgetown aforesaid; and do hereby make application to you, sir, and request that you will be pleased to appoint him my guardian; that thereby he may possess and exercise the right of protection to myself and the property that has descended to me. With great respect, I remain your most obedient servant, John W. Ott." On the back of which letter was the following affidavit: "Maryland, Frederick County, ss. On the 14th day of July, 1825, personally appears John W. Ott, son of Doctor John Ott, late of Georgetown, in the District of Columbia, deceased, the individual whose signature is attached to the within letter, before the subscriber, a justice of the peace in and for said county; and the said John W. Ott, being by me privately examined apart from and out of the hearing of all persons whomsoever, declares that he had written the within letter for the purpose of having it delivered to the Honorable Judge Lee as thereby directed, with the view to procure the appointment of his uncle, John T. Ritchie, to be his guardian, and that he has not been induced to choose his said uncle to become his guardian by threat or ill usage of his said uncle, or of any other person, or through his or their displeasure. Witness my hand, George Rohr."

It is noted on the record of the orphans' court, that the court delivered an elaborate written opinion, concluding with a decree that the petition of Forrest and Mauro be dismissed with costs. It appears from that opinion, the substance of which was published in the National Intelligencer of the 25th of December, 1826, that although the counsel of Mr. Ritchie objected to the court's opening the case upon this bill of review, yet the court did open it; and did reconsider and confirm its former decree; and the question whether that court had power thus to review its decree is to be considered as reserved for the appellate court. The appeal from the original decree appointing Mr. Ritchie guardian, was dismissed by this court at May term, 1826, because the transcript of the record was not transmitted within thirty days after the decree. It is now contended by the counsel of Mr. Ritchie that the present appeal is to the refusal of the orphans' court to review its former decree, and not to the decree which in effect affirmed its former decree; so that the only question now before this court, as they contend, is, whether the orphans' court erred in refusing to reconsider its former decree. But the elaborate opinion of that court shows that it did review its former decree, and that it was because it found that decree to be correct that it passed

the decree for dismissing the petition of Forrest and Mauro. The former decree was reviewed, and in fact affirmed. Does the appeal from this last decree bring before this court the question whether the former decree was correct? If it does, and if this court should be of opinion that the first decree was erroneous, and that the orphans' court, upon the review or rehearing, ought to have reversed that decree, is it competent for this court to reverse it? If the orphans' court, in its discretion, had a right to review or rehear the cause, and did review or rehear it, we suppose no one will doubt the right of either party to appeal from the new decree made at the rehearing.

The first question, then, is, whether the orphans' court had a right, circumstanced as the cause then was, to grant a rehearing, or to review its decree. It is said that the proceedings of the orphans' court are analogous to those of a court of chancery, and that by the rules of that court a cause cannot be reheard after the decree has been enrolled; and that it is considered as enrolled after the expiration of the term in which the decree was rendered. To this it is answered, that the orphans' court has no terms. It sits every day, or whenever the judge thinks proper. That its decrees are never, in fact, enrolled, and are only to be found in the paper minutes of the court. That the court is not bound by the rules of the chancery court; and if it were, yet in courts of chancery a rehearing is often had after the term in which the decree is pronounced, and is always within the discretion of the court, who will, and often have set aside the enrolment for the purpose of letting in a party to a rehearing. 1 Har. Ch. Prac. 649, and to this effect were cited the case of *Travis v. Waters*, 1 Johns. Ch. 48; and *Consequa v. Fanning*, 3 Johns. Ch. 364. See also the case of *Mills v. Banks*, 3 P. Wms. 1, 8, where a cause was reheard after a lapse of eighteen years, and where the chancellor says that a rehearing is in the discretion of the court, and is not always a matter of right; and in one case, where the decree was not enrolled, the court refused to discharge an order for a rehearing, although at the distance of about twenty-four years. The principal difference between a rehearing and a review, is in this, that a rehearing may be had before enrolment of the decree; but after enrolment the party is put to his bill of review, which, if it be founded upon new matter of fact, discovered since the closing of the commission to examine witnesses, cannot be filed without leave granted upon petition; but if it be founded upon error in matter of law apparent upon the record, no such previous permission of the court is necessary. In the latter case, "the constant method is to put in a plea, and demur, namely, a plea of the decree, and a demur against opening the enrolment; and an answer is rarely required, unless the same be ordered by the court; so that in effect a

bill of review cannot be brought without leave of the court, in some shape; for if it be founded upon matter apparent in the body of the decree, then, upon the plea and demurrer, the court judge whether there are any grounds for opening the enrolment; and if upon matter of fact newly discovered, the court, upon the petition for leave to file the bill, will judge whether there be any foundation for such leave." 1 Har. Ch. Prac. 170.

The court, then, had a right to review its decree. In the present case, leave was granted "to file a petition, praying the court to review its order, in granting to John T. Ritchie the guardianship of John W. Ott." This petition was analogous to a bill of review in chancery, and points out the errors in law apparent upon the record for which it alleges that the decree ought to be reversed. It admits that the decree had been signed and enrolled, and prays that it may be reviewed and reversed. To this bill, or petition, the defendant, Mr. Ritchie, was cited to answer; and, having appeared, filed a general demurrer; to which there was a general replication and joinder. The decree of the orphans' court thereupon was, that the prayer of the petition cannot be granted, and that the petition be dismissed, with costs. This decree must be referred to the demurrer, and considered as a judgment in favor of the defendant, upon the issue of law joined by the parties; and cannot be considered as the mere exercise of the discretion of the court in refusing to review its decree, or to rehear the cause. That discretion was exercised, and perhaps suspended in the order for leave to file the bill of review. The decree is, in effect, a judgment that the errors, suggested in the bill of review as apparent on the record, were not such as ought to have induced the orphans' court to reverse its decree appointing Mr. Ritchie guardian to John W. Ott. The parties had, by the demurrer and joinder, submitted to the court a matter of law, (of right,) not of discretion. The court decided the matter of right, and the parties, aggrieved by the decree, have appealed to this court. The question, then, upon this appeal, is, whether that matter of law, (or right,) thus put in issue by the parties, has been correctly decided by the orphans' court.

The bill of review states five grounds of error: (1) That the petitioners, Forrest and Mauro, had, by a previous order of the court, been appointed guardians of John W. Ott, by virtue of the first section of the twelfth chapter, Act 1798, c. 101, and that it was not competent for the court to remove them, except for cause shown, in the omission or neglect of some duty; nor without being cited and heard. (2) That the orphan, having had a guardian appointed for him until the age of 21, had no right, at the age of 14, to choose a guardian. (3) That he was not brought into court to choose his guardian. (4) That the petitioners were not cited to show cause why they should not be

removed; and (5) That they had no notice of the application and appointment of Mr. Ritchie, until after he was appointed.

1. By the 1st section of the 12th chapter of Act 1798, c. 101, it is enacted, "that whenever land shall descend, or be devised to a male under the age of 21 years, or to a female under 16," "and the said male or female shall not have a natural guardian, or guardian appointed by last will, agreeably to the statute in that case made and provided," (12 Car. II. c. 24,) "the orphans' court shall have power to appoint a guardian to such infant until the age of twenty-one years, if a male, and until the age of sixteen, if a female, or marriage." Under this clause of the statute, the petitioners Forrest and Mauro were, in 1821, appointed joint guardians of the infant children of Dr. Ott. As the court had power to appoint them guardians until the full age of the infants, and as they were appointed generally, without limitation of time, their authority continues until the infants respectively attain that age, unless it be lawfully revoked by the court. The orphans' court has no express power, under the statute, to remove a guardian, or to revoke the appointment, except in the single case of his refusing to give security when required; and by the 20th section of the 15th chapter of Act 1798, c. 101, it is enacted, "That the orphans' court shall not, under any pretext of incidental power or constructive authority, exercise any jurisdiction whatever, not expressly given by that act, or some other law." If it claim jurisdiction to remove a guardian for any other cause, it must claim it as a jurisdiction incidental to the power of appointment. But all incidental jurisdiction is expressly forbidden by the statute. The orphans' court, therefore, had no power to remove the guardians, or to revoke their authority, they never having refused to give the security required.

2. But it has been contended that an infant has a common-law privilege of choosing a guardian at the age of fourteen, and that this privilege has been "sanctioned by the uniform usage, in England and this country, of a thousand years;" that it is "a solemn, immemorial right;" and that the statute, when it authorized the court to appoint a guardian until the infant should attain the age of twenty-one years, meant to say, "unless the orphan, after he shall arrive to the age of fourteen years, shall object to such appointment, and ask permission to choose another guardian." But it was not contended that this was an absolute right to choose a guardian; but a right to be exercised under the "surveillance" of the court; for it was admitted that the court would not appoint the person nominated by the orphan if he "were non compos, convicted of an infamous crime, or notoriously dissolute and immoral; nor unless he gave ample security for the faithful discharge of his trust." The statute

does not in the slightest manner recognize, or allude to, the right of the infant to choose his guardian; but by giving the court an absolute power to appoint a guardian till twenty-one, evidently negatives the idea of any such right; for such a right is inconsistent with the power given to the court. But it seems to have been taken for granted that, by the common law, the infant had a right to choose his guardian in all cases. This is not true. When there was a guardian in chivalry, or by nature, or by statute, the infant had no right to choose. It was only when there was a guardian in socage, or for nurture, in which cases the guardianship continued only till the age of 14, that the infant's right of election existed.

By the law of England there are various kinds of guardians: (1) Guardian in chivalry; (2) in socage; (3) by nature; (4) for nurture: (these four were by the common law); (5) by the statute of 4 & 5 Phil. & M. c. 8, and 12 Car. II. c. 24, § 8, by which statutes the father has a right, by deed or last will, to dispose of the custody of his infant children until their age of 21, or for a less time, and these are called "testamentary," and sometimes "statutory" guardians; (6) guardians by the custom of particular manors, cities, &c.; (7) guardians appointed by the lord chancellor, exercising, in this respect, the royal prerogative of *parens patriae*; (8) guardians appointed by the ecclesiastical courts; (9) guardians *ad litem*, appointed by any court in which the interests of an infant are litigated (3 Bl. Comm. 426; Harg. Co. Litt. 88b, note 16); these are, in general, only appointed *pro hac vice*, and continue only until such interest is finally disposed of by the court; (10) guardians by election.

1. Guardian in chivalry existed only when the infant inherited lands holden by knight's service. This guardian had the custody of the person and lands of the infant until his full age of twenty-one, and took the profits to his own use without account; and also the value of the marriage of his ward. The infant had no right to elect a guardian. This tenure was abolished by the statute 12 Car. II. c. 24, and with the tenure went the right of guardianship connected with that tenure.

2. Guardianship in socage arose, like that in chivalry, wholly out of tenure. It was necessary that the ward should have inherited lands holden in socage. It continued only until the heir attained the age of fourteen, although some have said that it continued until the age of twenty-one, unless the ward, after his age of fourteen, should have elected another guardian. King v. Pierson, And. 813; Lit. § 123; Byrne v. Van Hoosen, 5 Johnn. 67. The guardian in socage had the custody of the person and of the lands; but wholly for the benefit of the ward. The guardian in socage must be the next of kin,

to whom the lands of the infant cannot by any possibility descend.

3. Guardianship by nature, existed only where the ward was heir apparent of the guardian, and extended only to the person of the ward. The father was always guardian by nature of the person of his heir apparent, even when the infant inherited lands holden by knight's service, and where the lord was guardian of the estate. Guardianship by nature continued until the full age of twenty-one; and the infant had no right to elect a guardian. This guardianship did not extend to the younger children who were not heirs apparent. Guardian by nature has no right to the custody of the infant's estate. H. St. G. Tucker's notes on 1 El. Coun. 461.

4. Guardianship for nurture extended only to the custody of the persons of those infants who are not heirs apparent, and continued only until their age of fourteen years, and none could have it but the father or mother. It only occurs where the infant is without any other guardian. After fourteen the infant is at liberty to choose his guardian. How this election is to be made, at common law, does not appear in any book that we have consulted.

The court of chancery, exercising, in regard to infants, the prerogative of the king as *parens patriae*, will appoint guardians whenever such appointment is necessary for the purpose of protecting the infant's general interest, or for the purpose of sustaining a suit, or of consenting to the marriage of the infant. In re Woolscombe, 1 Madd. 213. But it could never have been required, by the common law, that all the infants in the kingdom who had not guardians provided by the common law, should be brought into the court of chancery, to obtain them. The ecclesiastical courts have claimed a right to appoint curators or guardians, as to legacies, and distributive shares of the personal estates of intestates, and this right has been admitted by the common-law courts; but their right to meddle with the persons of infants has been denied both by chancellors and by common-law judges. 4 Burn, Ecc. Law, 88, 91; Banes v. Lowder, 3 Keb. 834; Bishop of Carlisle v. Wells, 3 Jones, 90, 2 Lev. 162; Buck v. Draper, 3 Atk. 631; Rex v. Delaval, 3 Burrows, 1436. There is a dictum of Lord Chancellor Hardwicke in 2 Ves. Sr. 375, that "supposing there was no testamentary guardian, nor a mother, if the infant has any socage land, and is of the age of twelve, if female, or of fourteen, if male, they are allowed to choose their guardian; as is frequently done on the circuit, and is the constant practice, and what this court frequently calls on infants to do; though this is still liable to any reasonable objection made to such choice." Mr. Hargrave, in note 16 to Co. Litt. 88b, understands the expression "on circuit" to mean

before a judge on the circuit. We have not found this practice alluded to in any other book, unless it be in Style, 456; but it is so explicitly stated by Lord Hardwicke that we must take it to be so; and it is probable that the appearance of the infant, and his choice, with the approbation of the court, were entered upon the minutes of the court, and constituted the only evidence of the title of the guardian thus chosen. This practice is, by Lord Hardwicke, confined to the case where the infant has socage land; and probably to the case where there had been a guardian in socage, which could only be where the infant took by descent. A person cannot strictly be said to have land unless he has a freehold estate; for none but a freeholder can be tenant to the precipice, or be the owner of real estate. Where an infant had land by purchase, and not by descent; or where he had only personal property, it does not appear that a guardian could be elected or appointed before a judge on the circuit.

The right of the ecclesiastical courts to appoint a curator of guardian for the personal estate, is probably no more than the right of every court to appoint a guardian ad litem (3 Salk. 177, pl. 14; 3 Burrows, 1436); for those courts, having jurisdiction as to wills and legacies, and the ordering of distribution of intestate estates, all legatees, and persons entitled to distributive portions of intestate estates, were parties before them; and if any of those parties were infants, those courts, as every other court, would have had a right to appoint guardians ad litem to protect their interests, so long as they were pending before those courts, and to receive and apply the money or other property which they should receive under the orders of such courts, who would have a right also to take security from such guardians for the faithful execution of their trust. This is probably the only foundation of the power of the ecclesiastical courts to appoint guardians; and it will not support a claim to appoint a guardian for the person of the infant, (*Loury v. Reynes*, 2 Lev. 217,) or for his personal estate acquired in any other way than by bequest, or in the course of distribution. In the case of guardian for nurture it does not appear in what manner, or before whom the infant, when he attained the age of fourteen, was to make his election; it is probable, however, that it was to be made as in the case of tenure by socage. Nor does it appear that an infant, by the law of England, had a right to choose a guardian in any case where a guardian had been appointed for him by any person having a discretion to choose, unless such appointment were expressly limited to the time of the infant's attaining the age of fourteen, which it is believed, in analogy to the rule of the common law in guardianship in socage and for nurture, was generally the case in appointments by the court of chancery, and by

the ecclesiastical courts; after which age of fourteen they were generally permitted to nominate their guardians, and if the courts perceived no material objection, they appointed the guardians thus nominated. *And. 313, 2 Lev. 217.* After the statute of 12 Car. II. c. 24, which abolished tenures by knight's-service, almost all the tenures became tenures in socage, and, consequently, almost all guardianships as to lands, fell upon persons not personally chosen by anybody. It was right that these accidental guardianships should be removable at the age of discretion of the infant; but the same reason did not apply to guardians selected by any authority competent to choose persons well qualified to take care of the interest of the infant. Hence the statute of 12 Car. II. c. 24, § 8, authorized the father to appoint a guardian to his child until the age of twenty-one, without recognizing any right in the child to choose a guardian. This provision, Mr. Justice Blackstone seems to think, was made in consideration of the imbecility of judgment in children of the age of fourteen.

Of the four kinds of guardianship at common law, it is believed that only one exists in this country, namely, guardianship by nature. Tenancy by knight's-service, and, consequently, guardianship in chivalry, never existed here, as the lands were, by charter, to be holden in free and common socage. Guardianship in socage cannot, since the Maryland statute of descents, 1786, c. 45, exist here, because there cannot be found any of kin to the infant, who may not, by possibility, inherit the land. Guardianship for nurture cannot exist here, because it is applicable only to such children as are not heirs apparent; and here all are, by that statute, heirs apparent, and, consequently, guardianship by nature exists in this country, and applies to all the children. But a guardian by nature, at the common law, has no authority over the lands of the infant, and, perhaps, not over his personal estate; as it has been decided, both in England and in some of these states, that he has no right to receive a legacy bequeathed to his ward. See *Harg. Co. Litt. 88b*, and note 12; *Genet v. Tallmadge*, 1 Johns. Ch. 3; *Anderson v. Darby*, 1 Nott & McC. 369; *May v. Calder*, 2 Mass. 59; *Strickland v. Hudson*, 8 Rep. Ch. 168; *Dagley v. Tolferry*, 1 P. Wms. 285; *Eq. Cas. Abr. 300*, pl. 2; *Gilb. Cas. 103*; *Phillips v. Paget*, 2 Atk. 80; *Cooper v. Thornton*, 3 Brown, Ch. 96, 186; *Cunningham v. Harris*, cited by the master of the rolls, in *Cooper v. Thornton*; *Tucker's notes to 1 Bl. Comm. 462*; 1 Vern. 295; 1 Johns. Cas. 217.

5. Statutory guardianship. The statute of 4 & 5 Phil. & M. c. 8, which, by implication, gave the father a right to appoint a guardian, by deed or will, to his daughters until the age of sixteen, and upon the death of the father, without such appointment, gave the custody of the daughters to the mother;

and the statute of 12 Car. II. c. 24, § 8, which authorized the father to appoint, by deed or will, a guardian for his infant children until their full age, were in force in Maryland; and the latter is expressly recognized and referred to in the testamentary system of Maryland of 1798 (chapters 12, 101, § 1). These statutes are now in force in this country, and such guardians may now be appointed by the father.

6. Guardians by custom are unknown in this country.

7. Guardians by appointment of the chancellor. The chancellor in Maryland, it is believed, never had the power of appointing guardians, except *ad litem*.

8. Guardians by appointment of the ecclesiastical courts. No such courts exist in this country. The judge, or commissary-general, or deputy-commissaries, who exercised in Maryland the only remnant of ecclesiastical jurisdiction transferred to this country, had no such power. It was, by Act Md. 1715, c. 39, vested solely in the commissioners of the county courts, that is, the justices of the county courts.

9. Guardianship *ad litem*. All the courts had power to appoint guardians *ad litem*, to protect the interests of infants in their respective courts.

10. Guardianship by election, as mentioned by some of the English writers, has never been recognized in this country. Hargrave, in his note 16 to Co. Litt. 88b, says: "The right of making such an election arises only when, from a defect of the law, the infant finds himself wholly unprovided with a guardian."

Lord Coke, in Co. Litt. 87b, says: "If a man be seized of a rent-charge, rent-seck, common of pasture, and such like inheritances which do not lie in tenure, and deth,—his heir within the age of fourteen years,—in this case the heir may choose his guardian; but if he be of such tender years as he can make no choice, then (if the father hath made no disposition of the custody of the child,) it were most fit that the next of kin, to whom the inheritance cannot descend, should have the custody of him. And whosoever taketh the rent, &c., the heir shall charge him in an account. But if he hold any land in socage, in that case the guardian in socage shall take into his custody as well the rent-charge, &c., as the land holden in socage, because he hath the custody of the heir." This is a case in which Lord Coke supposes that the heir may choose his guardian before the age of fourteen. Mr. Hargrave remarks upon it, that "Lord Coke only takes notice of such an election where the infant is under fourteen; and, as to this, omits to state how, and before whom, it should be made. Nor have we yet met with any prior or cotemporary writer who supplies the defect. As to a guardian after fourteen, it appears, from the ending of guardianship in socage at that age, as if the com-

mon law deemed a guardian afterwards unnecessary. However, since 12 Car. II., enabling a father to appoint a guardian to his children till twenty-one, it has been usual, for want of such a guardian, to allow the infant to elect one for himself." "Such election is said to be frequently made before a judge on the circuit. 2 Ves. Sr. 375. But we do not think this form to be essential. The last Lord Baltimore, when he was turned of eighteen, having no testamentary guardian, and being under the necessity of having one for some special purposes, relative to his proprietary government of Maryland, named a guardian by deed." "Indeed, it seems as if there was no prescribed form of an infant's electing a guardian after fourteen, any more than there is before; and therefore election by parol might, perhaps, be sufficient, though it would be wrong to trust to a mode so unsolemn. But we do not wonder at the deficiency, because guardianship by election of the infant is of very late origin; it being, we believe, not only unnoticed by any writer before Lord Coke, except Swinburne, but there still being no cases in print to explain the powers incident to it, or whether an infant may change a guardian so constituted by himself. Even Lord Coke, we see, though professing to enumerate the different sorts of guardianship, and though he had before mentioned the latter one, omits it here." Co. Litt. 88b. "Whence it may probably be conjectured that, in his time, it was, in strictness, scarcely recognized as legal."

What Swinburne says in part 8, § 11, respecting the right of the infant to choose his tutor, applies only to the custom of the province of York. Buck v. Draper, 3 Atk. 631. Thus we see that the right of infants, at the age of fourteen, to choose their guardians, is not universal, nor has been "of a thousand years' standing." By the law of Maryland (Act 1715, c. 39, § 7), "If any part thereof (that is, of the intestate's estate) belong to an orphan who is capable of choosing his guardian, such orphan shall be called to court (the county court) and shall then and there choose his guardian, into whose hands the said orphan's estate shall be committed; but if such orphan be not at age, then the justices aforesaid (of the county court) shall put the persons, lands, goods, and chattels of the orphans into the hands of such person or persons as they shall think fit, and take a bond, with two sufficient sureties, in the names of the orphans themselves, for the securing and delivering the said estate to said orphans, or their guardians, when thereunto lawfully called." The persons thus appointed, before the orphan is of age to choose his guardian, are, by the act, called trustees. It is not expressly said in the act how long these trustees shall exercise the rights of guardianship; but, from their being bound to deliver up the property to the orphans themselves, it is evident that the guardian-

ship was to continue, or might continue, until the orphans should be of full age, and capable of receiving the possession of their estates; and by the provision being in the alternative, namely, to deliver up the estates to the orphans, or to their guardians, it is equally evident that guardians might be afterwards appointed; but as the county court had power, upon the trustees' refusal to give new security when required, "to remove the orphan's estates out of their hands" (Act 1715, c. 39, § 20), "and to remove the person and estate of such orphan into other hands" (Act 1729, c. 24, § 6), it does not necessarily follow that the trustees so appointed were to be removed of course, upon the infant's attaining the age of fourteen; nor that the infant, after such appointment, had a right, at the age of fourteen, to choose his guardian; for the obligation of the trustees to deliver up the estate to the guardian, when required, might be only an obligation to deliver it to the person into whose hands the court should order it to be removed, in the cases referred to in the 20th section of Act 1715, c. 39, and 6th section of Act 1729, c. 24.

This idea is corroborated by the 33d section of Act 1715, c. 39, by which, if a guardian should commit waste, and should fail to give security as the court should require, to answer to the orphan for the waste, when at age, the orphan (if at age to choose his guardian,) should elect his guardian; but if not of age to make such election, the court should appoint such other person as they should think meet; and the guardian so elected, and the other person so appointed, were to hold and enjoy the land and plantations until the orphan should "come to age." By this section, the persons appointed by the court while the orphan was under fourteen years of age, were required to hold the estate granted, until the full age of the infant; therefore, taking together the 7th, 20th, and 33d sections of Act 1715, with the 6th section of Act 1729, and Act 1763, c. 24, it seems to us that the right of the infant to elect a guardian, which is clearly recognized by those acts, is confined to the case where the infant is without a guardian or trustee already appointed by the court, or by the father, under the statutes of 4 & 5 Phil. & M. c. 8, or 12 Car. II. c. 24. By Act 1763, c. 24, the court was authorized, on application, to permit an orphan of fourteen years of age to choose his guardian; and if under fourteen, the court was to appoint the guardian, even before the distributive share of the orphan was certified by the commissary to the county court; and the guardian so appointed was to have the same power as a guardian otherwise appointed, viz. to hold the estate until the full age of the orphan. The act of Maryland of 1777 (chapter 8), by which the orphans' court was erected, gives to that court all the powers before vested in the county courts, or in the commissary general, in relation to guardians and

testamentary affairs. Thus the law stood until the legislature revised the several acts upon the subject, and adopted the system reported by the chancellor of Maryland in Act 1798, c. 101.

In the previous acts nothing was said of guardians by nature, or natural guardians, or testamentary guardians, except that the latter are excluded from the operation of the 30th section of the act of 1715, which requires the guardian to ascertain the annual value of the real estate, &c., the words are "other (orphans) than such whom the testator in his lifetime, by his last will or testament, hath otherwise ordered and disposed of." But those acts only provided for the case of orphan infants; that is, fatherless infants. The legislature seems to have supposed that the father, as guardian by nature, had the custody and care of the real and personal estate, as well as of the person of his child; and does not seem to have considered the mother of an orphan as his guardian by nature, after the death of the father. This was not so at the common-law. By that law the guardian by nature, had only the custody of the person of his heir apparent; and, after the death of the father, the mother, if living, was guardian by nature to her heir apparent. The grandfather was also guardian by nature to his grandson, if he was his heir apparent. So the grandmother, the uncle, the aunt, &c., would, each, be guardian by nature to his or her heir apparent; and yet the old acts of Maryland, in all such cases, authorized the county courts to appoint guardians, although there were already, by the common law, guardians by nature whose authority over the person of the infant, continued until he arrived at the age of twenty-one years.

Those acts, and especially the act of 1715, having provided for a guardian in every case, except the case of an infant whose father was living, ought to be construed as having virtually declared that the father, as guardian by nature, should have the custody and care of the real and personal estate of the infant, as well as of his person. But the acts did not give the courts authority to require surety from the father, as natural guardian, unless that authority were given by the 20th section of the act of 1715, which enacts, "that the justices of the county courts take able and sufficient security for orphans' estates, and inquire yearly of the security; and if there be just cause, that they require new and better security; and upon refusal to give new and better security, that they remove the orphans' estates out of their hands." This section was not deemed sufficiently explicit to enable the county court to demand security from guardians, chosen by infants of fourteen years; and to remedy this defect, an act was passed in 1752 (chapter 3), expressly for the purpose of enabling the court to require security from such guardians; but that act did not apply to guardians by nature. If the 20th section of the act of 1715, did not, by

its general terms, include guardians chosen by infants, it could not include natural guardians nor testamentary guardians. Indeed, if testamentary guardians had not been expressly recognized in the 30th section of the act of 1715, it would be difficult to maintain that the general words, in which the 7th section gives the power of appointment to the county court, would not be justly construed as repealing the statutes of 4 & 5 Phil. & M. c. 8, and 12 Car. II. c. 24, so far as they might have been supposed to operate in Maryland. But it is believed that those statutes have always been considered as in force in Maryland, so far as to authorize a father to appoint, by his will, a guardian for his infant children.

Again, the 7th section of Act 1715, c. 39, by giving power to the court to appoint a guardian for every orphan who is entitled to a distributive share, superseded, in all such cases, the common-law right of guardianship by nature, except in the case of the father; so that neither the mother, nor the grandfather, nor the uncle, could, in such cases, be guardians by nature, in Maryland. From whence it follows, that after the statute of descents (Act 1788, c. 45), and before 1798, in Maryland, there were only three kinds of guardians, viz.: (1) Testamentary guardians under the statute of 4 & 5 Phil. & M. c. 8, and 12 Car. II. c. 24; (2) natural guardians; (3) statutory guardian, viz. guardian appointed by the county court under the statute of 1715, and by the orphans' court under the statute of 1777 (chapter 8). For although the orphan, at the age of fourteen, had a right to choose a guardian, the appointment was still to be made by the court; and although the persons appointed by the court, when the orphan was under the age of fourteen, were called trustees, yet they were, in fact, guardians, and had all the rights, and were subject to all the duties of guardians; they are, indeed, sometimes called guardians in the same act of 1715. The infant, if no guardian had been appointed for him, and if his father were not alive, when he arrived at the age of fourteen, had a right to choose his guardian in court; but if a testamentary guardian had been appointed, or if the court had appointed a guardian for him before his age of fourteen, or if his father were living, he had no right to choose his guardian. If this be the true construction of the law of Maryland previous to 1798, the provisions of the act of that year (chapter 101) will be perfectly intelligible.

The act of 1798 (chapters 101, 12) does not, like the act of 1715, confine the power of the court to the case of orphans entitled to a distributive share of an intestate personal estate, but extends it to all infants to whom lands shall descend, or be devised, or who may be entitled to a legacy, or to a distributive share of the personal estate of an intestate, if the infant have no natural or testamentary guardian. By "natural guardian," in this statute, must be intended such a natural guardian as is entitled to the guardianship of the estate,

as well as of the person of the infant. At common law, there was no such natural guardian; the guardian by nature, under that law, being only entitled to the custody of the person of his heir apparent. The previous law of Maryland, recognized only one natural guardian entitled to the guardianship of the estate of the infant; and that was the father. If, then, the infant have no father, nor testamentary guardian, the orphans' court has the right of appointing the guardian. The act of 1798, does not, in any manner, recognize the right of the infant to choose his guardian at any age. On the contrary, the orphans' court is authorized, in all cases in which it may appoint a guardian, to make the appointment until the full age of the infant. This power is directly repugnant to those parts of the former acts of Maryland, which authorize the infant to choose his guardian, and consequently repeals them. Guardianship in socage, and guardianship for nurture, which were the only two cases in which the infant had, by the common law, a right to choose his guardian, seem to have been virtually abolished by Act 1765, c. 39, which gave the power to the county courts to appoint guardians to all orphans entitled to a distributive share. The right of election, which they afterwards had, depended upon the statutes which were repealed by that of 1798 (chapter 101). The case of an orphan who has acquired property by deed of gift, or by purchase other than devise, is not provided for by that statute. There is no court competent to appoint a guardian for him, nor do we think he can constitute one by his own act. Indeed, we think he has not, in any case, a right to choose his guardian. And it was not without reason, that the legislature thought proper to transfer the right of election from the infant to the orphans' court. At the age of fourteen, the infant begins to be restless and ungovernable, and the salutary restraints of the guardian are irksome. The infant is apt to think his guardian penurious and tyrannical. He wants greater indulgences; and there are always artful and insinuating men enough, who are eager to grasp all the property they can lay hold of; and who, taking advantage of these dispositions in the infant, will stimulate his restlessness, excite his suspicions, undermine the authority of the guardian, and finally prevail on the infant, in his simplicity, to place his property in their hands. The chance of evil resulting from the infant's right of election, seems greater than the chance of good; and the choice of the court is more likely to be judicious than that of the infant.

The third error assigned, is that the infant was not brought into court to choose his guardian. This appears to us also to be a fatal error; especially as the infant was not out of the jurisdiction of the court at the time. In the case of *Loyd v. Carew*, in 1699, 1 Eq. Cas. Abr. 260, pl. 2, it is said, that "if a person, appointed a guardian pursuant to

the statute (12 Car. II. c. 24), dies, or refuses to take upon himself the guardianship, my lord chancellor may appoint a guardian; but a guardian cannot otherwise be appointed, than by bringing the infant into court, or his praying a commission to have a guardian assigned him." 2 Fonbl. Bankr. Cas. bk. 2, pt. 2, c. 2, § 2, p. 236. In an anonymous case, in the upper bench, in 1655: "The court was moved in behalf of an infant to discharge a guardian assigned by the court, with an intent to make Richard Somers, attorney of this court, guardian in his room, and that the former inspection may be discharged, and that the infant may now be inspected again, because when the former inspection was, and the guardian assigned, there was no action depending in court against the infant. Glyn, C. J. Let it be so, for the cause you have alleged, and give notice of it to the former guardian." Style, 456. 1 Newl. Ch. Prac. 105. If the infant reside within twenty miles of London, the guardian is appointed by the court, for which purpose the infant, and the person intended to be appointed guardian, personally attend in court. If the infant reside above twenty miles from London, the guardian is appointed by commission, and the infant must be personally before the commissioners. 14 Ves. 172; 2 Newl. Ch. Prac. 151; 1 Har. Ch. Prac. 711, 712; 2 Mad. Ch. Prac. 279. The Maryland act of 1715 (chapter 39, § 7), which allowed an infant of the age of fourteen to choose his guardian, required the infant to be called to court, and then and there to choose his guardian; and Act 1798, cc. 101, 12, § 2, says, "The said court shall have power to call, or have brought before them, any orphan as aforesaid, for the purpose of appointing a guardian." If, as we have supposed, the only right which the infant had, in Maryland, to choose his guardian, be given by the statute, it must be exercised

in the manner prescribed by the statute. We think, therefore, that if the infant had a right to choose his guardian, it could only be done personally, and in open court, and not having been so done, the election and appointment were void.

The fourth error assigned is, that the petitioners were not cited to show cause why they should not be removed. That the petitioners, who were the actual guardians, and who had a right to continue such until the full age of their ward, unless lawfully removed, should have had notice of his application, and an opportunity to show cause against it, seems to have been a course dictated by a common sense of justice. They had a power coupled with an interest, which they had a right, and perhaps, were bound to defend. But, as we think the orphan had no right to elect a guardian, and if he had, he could not exercise it out of court, we think the want of notice is a fatal error. The fifth error assigned is in substance only a repetition of the fourth.

Upon the whole, we are of opinion, that the orphans' court, having appointed Mr. Forrest and Mr. Mauro guardians of the infant until his age of twenty-one years, had no jurisdiction or authority to appoint Mr. Ritchie, and that his appointment is not merely voidable, but absolutely void; that Mr. Forrest and Mr. Mauro have never ceased to be guardians; and are now entitled to all the rights and powers of guardians; and that the sentence of the orphans' court, dismissing the bill of review, be reversed, with costs; and that this court, proceeding to pass such sentence, as the orphans' court ought to have passed upon the hearing of the bill of review, should order and decree that the order of the orphans' court, appointing John T. Ritchie guardian to the infant John W. Ott be reversed, with costs.

In re JOHNSON.

(54 N. W. 69, 87 Iowa, 130.)

Supreme Court of Iowa. Jan. 21, 1898.

Appeal from district court, Des Moines county; James D. Smyth, Judge.

On April 7, 1891, J. H. Sturgis filed his petition showing that he is the father of Mary E. S. Johnson, then about 7 years of age; that some years previous she was adopted by Frank A. and Amelia S. Johnson, both of whom are now deceased; that said minor needed the care and protection of petitioner, and that he was a householder, and able to care for said child; that at the time of the decease of said Johnson, which was since the decease of his wife, he claimed to be a resident of Des Moines county, Iowa; that said child has no legally appointed guardian, and cannot be so well taken care of as by the petitioner,—wherefore he asks "that he may be appointed guardian of the person of said minor child." On the 11th day of April following, D. W. Diggs filed a remonstrance, stating that said minor child was adopted by Mr. and Mrs. Johnson some years previous, by contract with the petitioner, and according to the laws of Dakota, in which territory said parties then resided; that said Johnson and wife took the child, and gave it their surname, according to the contract; that by the laws of Dakota said Sturgis was relieved of all care of said child, and responsibility to and for said child, and thereafter had no right over it. He sets out the statute of South Dakota authorizing the court to appoint guardians of "minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who reside out of the territory, and have estates within the county." He alleges that Mr. Johnson executed his last will, which was duly probated in the Des Moines district court, wherein he nominated the remonstrator, D. W. Diggs, to be a guardian of the person and property of said child, and that in pursuance thereof he took charge of said child, and then had her at his home, in South Dakota. He made further statements as to his ability and qualifications to care for said child as guardian, and urged that for the reasons stated the district court of Des Moines county had no jurisdiction to appoint another as guardian. The petitioner filed a motion to strike said remonstrance, and thereafter D. W. Diggs filed objections to the appointment of said Sturgis as guardian, setting forth the adoption of the child by Frank A. Johnson, and the appointment of the objector in the will; that no facts were shown that he is not a proper person to take charge of said child; that he had had charge of her since the death of Mr. Johnson; that he had filed his petition in this court for letters of guardianship, as provided in said will,—and prayed that evidence may be heard, showing that the welfare of said child would be best

promoted in his custody. An order was entered sustaining the motion of petitioner to strike from the files the remonstrance of Mr. Diggs, and appointing petitioner guardian of the person of said minor, from which D. W. Diggs appeals.

J. T. Illick, for appellant. Dower & Huston, for appellee.

GIVEN, J. I. Appellant moves to dismiss the appeal upon the grounds that appellant, Diggs, is not a party to the proceeding; is not interested therein; that no judgment has been entered against him, nor that affects any substantial right of his, in such manner as to entitle him to appeal. It requires no citations to show that in the appointment of guardians the controlling consideration is the welfare of the ward. It is a special proceeding to make an appointment, to which no person has a private right, whatever the preferences in his favor may be. *Lawrence v. Thomas*, (Iowa,) 51 N. W. Rep. 11. It appears from the record that this child was adopted by Mr. and Mrs. Johnson, by contract with the petitioner, under the laws of Dakota, whereby they became entitled to all the rights of natural parents; and the petitioner was relieved of all parental duties to the child, and surrendered all rights over it; that, Mrs. Johnson being deceased, Mr. Johnson appointed appellant guardian of the child, as authorized by the statute of Dakota, in his will; that appellant has cared for the child, in his home in Dakota, since the death of Mr. Johnson; and that he is a fit person to be guardian, and has petitioned the district court of Des Moines county to appoint him. This is a contest between Mr. Sturgis and Mr. Diggs for the appointment, and, under the facts alleged, Mr. Diggs has a right to be heard. The order was against his protest, and against his appointment. He certainly has the right to have his claims considered. The motion to dismiss the appeal is overruled.

2. Appellant's first complaint is that the court erred in striking his remonstrance. This remonstrance is solely against the jurisdiction of the court, and is grounded upon the fact that appellant was appointed guardian of this minor in the will of Mr. Johnson, as authorized by the laws of Dakota. It is alleged in the petition, and found by the court, that Mr. Johnson was a resident of Des Moines county, Iowa, at the time of his death. It is further found that his last will and testament was duly admitted to probate in that county, as the place of his residence, and principal administration granted on the estate. The residence of Mr. Johnson being in Des Moines county, that was the domicile of the child, and the court of that county had jurisdiction to appoint a guardian of its person, though it was not at the time residing in the county. *Jenkins v. Clark*, 71 Iowa, 552, 32 N. W. Rep. 504. Testamentary guardianship

is not authorized by our present Code. It was allowed under the Code of 1851, § 1492, and under the revision of 1860, § 2544, but was omitted from the Code of 1873, though recommended by the Code commissioners. The Code, § 47, repealed all prior public and general statutes. The Codes of 1851 and 1860 were the same, and were enactments of the common law on this subject, and hence their repeal could not have the effect of reinstating the common law. To so hold would be to deny any effect to the repeal. In *Burger v. Frakes*, 67 Iowa, 460, 23 N. W. Rep. 746, and 25 N. W. Rep. 735, it is said "that the law prescribes that a parent may provide by will for the care and custody of a minor child." This is certainly true, but not as against the right of the proper court to appoint a guardian. It is not a recognition of the right of a parent to appoint a guardian by will. If Mr. Johnson continued to reside in Dakota to the time of his death, and the domicile of this child had been in that state, the testamentary appointment of appellant under the laws of that state might be a sufficient plea against the jurisdiction of the courts of this state to appoint a guardian; but as the residence of Mr. Johnson was in Des Moines county, and as the domicile of the child was that of the parent, the testamentary appointment of appellant under the laws of Dakota did not deprive the district court of Des Moines county of jurisdiction to appoint a guardian. It follows from this conclusion that there was no error in striking appellant's remonstrance.

3. Appellant's other assignments of error are that the court erred in appointing the petitioner guardian of the person of said minor, in not appointing him guardian of the person and estate, and in refusing to take evidence to determine whether or not said child's welfare would be better promoted in his care, or in the care of the petitioner. The record shows that the cause came on for hearing upon the motion to strike appellant's remonstrance. "The court, upon hearing the arguments of counsel, grants said motion, and thereupon made and caused to be entered the following order and judgment in said cause." The judgment finds that petitioner is father of the minor, a citizen and resident of Iowa, and a fit person to be appointed guardian. "We will presume, in favor of the court's findings, that legal evidence authorizing the decree was introduced, and considered by the court." *Henry v. Evans*, 58 Iowa, 580, 9 N. W. Rep. 216, and 12 N. W. Rep. 801. While we think the nomination in the will of a party as guardian should receive full consideration in the selection of a guardian, yet the fact that appellant was a nonresident of the state was a sufficient reason why he should not be appointed. The selection of a guardian is, of necessity, largely within the discretion of the court appointing, and it is only where there is a clear abuse of that discretion that this court will interfere. There is nothing in this record to show that the discretion was abused, and the order and judgment of the district court are affirmed.

OTIS v. HALL.

(22 N. E. 563, 117 N. Y. 181.)

Court of Appeals of New York. Nov. 1, 1889.

Appeal from supreme court, general term, fourth department.

This was an accounting by Stephen S. Otis, as guardian of Henry Hall. The guardian's account, as presented to the surrogate's court of Lewis county, charged the ward for 12 years' board, \$1,248; wearing apparel, \$240; interest on the board and clothing bill, \$236.57. The account credited the ward for pension money received between 1867 and 1879, \$576.57; work on farm, \$250. It appeared that on his own application Otis was, on the 14th of May, 1866, appointed guardian of the person and estate of the infant, and in February, 1886, he presented his final account, verified in the usual manner. The ward excepted to every item of credit claimed by the guardian, "for any money paid, or for food, clothing, or care provided," upon several grounds, and, among others, (1) that while still an infant the guardian "took him into his family" as one of its members, without any intention of charging for his board, care, or support, and in that character retained and treated him, the infant, in the mean time, working for the guardian on his farm and otherwise, as he dictated, and in such labor earning more than enough to pay for his board, clothing, and maintenance; (2) that the money with the receipt of which the guardian charged himself was granted by the government of the United States to the ward as pension money on account of his father's services as a soldier and death in the Rebellion of 1861, and was inapplicable to any demand of the guardian, and was not in fact so applied by him, and the ward asked that Otis be decreed to pay over to him the funds so received, with interest. The issues thus presented were heard by the acting surrogate, and from his report it appeared that the exceptions were well founded in fact, and, as matter of law, he decided "(1) that, having assumed the relation of parent to his ward, the guardian can make no charge for support, and the ward cannot receive pay for services; (2) that, having agreed with the step-father of the ward that he would pay over to the ward the money he should receive, and interest when he became of age, and having taken the child on that agreement, the guardian cannot now charge for support, and take that money for recompense." The surrogate therefore charged the guardian with the sums received by him, with interest, and, after deducting his commissions and certain expenses, directed him to pay the balance, viz., \$1,042.56, to the ward, with costs of the proceedings. Upon appeal by the guardian the decree of the surrogate was in all things affirmed by the supreme court, and the guardian appeals to this court.

Elon R. Brown, for appellant. Kilby & Kellogg, for respondent.

DANFORTH, J. (after stating the facts substantially as above). It is well settled that, where parties sustain the relation of parent and child, either by nature or adoption, the former, in the absence of an express promise, cannot be required to pay for services rendered by the child, nor the latter be obliged to pay for maintenance. No case has been cited to the contrary, but the learned counsel for the appellant, while conceding that "such is undoubtedly the rule of law," contends that a different doctrine should prevail in a court having, in respect to matters of this sort, a somewhat larger jurisdiction, and that the surrogate erred in not disposing of the question upon equitable principles. He might have done so had a case been made for such relief, (*Voessing v. Voessing*, 4 Redf. Sur. 364; *Hyland v. Baxter*, 98 N. Y. 610;) but we find nothing in the record which required his interference. It seems that the guardian took the infant into his family with the avowed intention of rendering care and maintenance gratuitously. He made no charge at any time, and, knowing that pension moneys would be coming to the child, agreed that they should be paid over to him when of age, with interest. The account actually presented by the guardian to the surrogate credits the ward with these moneys to the amount of \$576.57, credits him also with services rendered after the year 1875 in the sum of \$250, but makes the charge for maintenance and care absorb both items, and claims as due from the ward a balance of \$665.80. All this is contrary to the agreement on which he was permitted to take the child, and inconsistent with his conduct afterwards. He not only treated the child as a member of his family, and assumed the character of parent, but taught the child to call him "father," his wife, "mother," and told the neighbors that he had adopted him, and that the child would be his heir. The account now presented is at variance with those relations, and, in the absence of evidence that the support furnished exceeded the ordinary necessities supplied in a farmer's family, there was nothing to call for any allowance; and, moreover, the case actually made would have justified a finding that the boy's services were of such importance as to furnish a full compensation for his support. Such a finding was not necessary, for, under the circumstances, the guardian stood, by his act and his design, in the place of a parent, and his case forms no exception to the general rule that, where that relation exists, no charge should be made for services on one hand, nor for board and maintenance on the other. We agree, therefore, with the supreme court, and its judgment should be affirmed. All concur.

JACOBIA'S ESTATE v. TERRY.

(52 N. W. 629, 92 Mich. 275.)

Supreme Court of Michigan. June 10, 1892.

Error to circuit court, Wayne county; George S. Hosmer, Judge.

Action by the estate of Ida Jacobia against Frances Terry to recover money received by her as guardian of said Ida Jacobia. From the judgment both parties bring error. Affirmed.

W. L. Carpenter, for plaintiff. J. W. Donovan for defendant.

GRANT, J. In 1872, Mrs. Terry was appointed guardian of her niece, Ida Jacobia. Shortly after her appointment she received \$1,200, the property of her ward. Mrs. Terry took her niece into her family, and supported and cared for her until she was married, in 1880. She treated her as one of her own children, and no question is raised but that she properly performed her duty towards her ward. She filed no guardian's account until some time after her ward's marriage, but this delay she seems to have satisfactorily explained. Upon the hearing of her account in the probate court, judgment was entered in favor of the ward for the whole amount the guardian had received, with interest. This was evidently

based upon the testimony of statements claimed to have been made by the guardian, that she still held this money for her ward, and that she would receive it when she became of age. The guardian appealed to the circuit court, where the case was tried before the court without a jury, and judgment was entered for the ward for \$393.97. Both parties appeal. Counsel for the ward insist that the guardian was entitled to no credit for the board of her ward. Counsel for the guardian insist that the court erred in disallowing board for the years 1872 and 1873; in allowing interest; in not allowing her to turn back a house and lot, in which she had invested some of her ward's money; and in not allowing credit for \$375 paid by the guardian to the ward's husband.

We see no reason for disturbing the judgment of the court. The guardian was clearly entitled to some compensation for the support and maintenance of her ward, and the amount allowed was certainly reasonable.

The guardian was chargeable with interest on the money in her hands.

As to the money paid the husband, there was a conflict of evidence as to whether it was paid at the request of the wife. The finding of the judge upon this point, therefore, is conclusive. The judgment is affirmed, without costs to either party. The other justices concurred.

In re WILKINS' ESTATE.**Appeal of HADFIELD.**

(23 Atl. 325, 146 Pa. St. 585.)

Supreme Court of Pennsylvania. Jan. 4, 1892.

Appeal from orphans' court, Allegheny county.

In the matter of the guardianship of Joseph W., Mary J., Henry W., and Francis G. Wilkins, minors. From the order of the orphans' court appointing Mrs. Miriam Hays guardian of the persons of these minors, A. H. Hadfield, guardian, appeals. Affirmed.

T. E. Ryan, Ogden H. Fethers, and A. M. Imbrie, for appellant. C. Q. Dickey and Jas. G. Hays, for appellees.

PER CURIAM. The appellant was appointed guardian of the estate of the minor children of Joseph W. Wilkins, deceased, by the court of Waukesha county, in the state of Wisconsin, where their father resided at the time of his death. Henry W. Kendall was, by the same court, appointed guardian of their persons. The bulk of the estate of the minors is in the county of Allegheny, in this state, and their nearest relatives reside there. Their estate in Allegheny county was derived from their paternal grandfather, Joseph Wilkins, who died in 1888, leaving a large estate, a portion of which passed to the Fidelity Title & Trust Company, as guardian of the estate of the minors in that county. On the 9th of February, 1891, Kendall, the guardian of the persons of the minors, brought them from Wisconsin to Allegheny county, and shortly after their arrival the orphans' court appointed Mrs. Miriam Hays, their paternal aunt, guardian of their persons. From the order

an appeal was taken by the Wisconsin guardian, alleging a want of jurisdiction in the orphans' court of Allegheny. We do not regard this objection as well taken. The minors were brought within the jurisdiction of the court below by their guardian. Their paternal grandmother, and uncle and aunt, and other blood relations reside in Allegheny county, and, as before observed, the bulk of their estate is there. Their guardian in Wisconsin is a stranger to their blood, and we could not expect from him that care and attention to their training and education that they would be likely to receive from their blood relations, all of whom the court below finds to be in every way competent to have their custody. The court also distinctly finds that it is to the best interest of the minors that they shall reside with their relations in Allegheny county. We see no difficulty in disposing of the question of jurisdiction, unless we hold that the residence of minor children cannot be changed, even with the consent of their guardian. We are not prepared to assent to such a proposition as this. Granted that their domicile cannot be changed without the consent of the court of the domicile, it by no means follows that their residence cannot be changed by the guardian of their persons. The domicile may be in one state, and the residence for the purpose of guardianship of the person in another state. Taney's Appeal, 97 Pa. St. 74. The residence of a minor is frequently changed for educational and other purposes, and, as the action of the court below was clearly in the best interest of these children, we will not disturb the decree. Further comment is unnecessary, in view of the well-considered opinion of the learned judge of the orphans' court. The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

ILLUS.CAS.DOM.R.—10

PEPPER v. STONE.

(10 Vt. 427.)

Supreme Court of Vermont. Orange. Feb., 1838.

This was an appeal from a decree of the court of probate for the district of Randolph. On the 3d day of March, 1836, John Stone, the appellant, was appointed by said probate court, guardian of the minor children of Daniel Peaslee, deceased, and gave bonds according to law. On the 6th of April, 1836, at the request of the friends of said minor children, Josiah White, was by said court, appointed a joint guardian with said Stone, of said children, upon which the said Stone and White gave joint bonds, for the faithful performance of their duty, as such guardians, and a joint letter of guardianship issued to them from said probate court. On the 1st May, 1837, Ezra Pepper, the appellee, as grandfather of the said minor children, represented to said probate court, that the joint guardians were improperly managing *the property of their wards, and prayed the court to remove them from their guardianship, and appoint some other person or persons in their stead, and the 17th day of the same May was assigned by said court for a hearing in the premises. On the said 17th day of May, 1837, Josiah White resigned his trust, as one of the joint guardians of said minor children, whereupon said John Stone claimed, before said probate court, the right of sole guardianship. But that court revoked the joint letter of guardianship, and decreed that the trust, under said letter, cease, on the ground that the resignation of said White did, of itself, operate as a removal of said Stone, by a dissolution of the joint guardianship. No hearing was had by said court upon the complaint of the appellee. From this decree of the probate court Stone appealed to this court.

L. B. Peck, for appellant.

W. Upham, for appellee.

WILLIAMS, C. J. John Stone the petitioner, and Josiah White, were appointed joint guardians of the minor children of Daniel Peaslee. An application was made to have the guardians removed, and one of them, viz. White, tendered his resignation. The other guardian, Stone, claimed to be appointed sole guardian, or that the guardianship belonged to him. The judge of probate removed the guardians, on the ground that the resignation of White was a dissolution of the joint guardianship, and, of itself, operated as a removal of Stone, and, thereupon, proceeded

to appoint another guardian. It was proper for the judge to state the ground of his proceeding, especially if it was upon a construction of the statute, or upon the decision of any legal question. If the removal was not because there were objections to the guardians, or the manner of executing their trust, then the court of probate has never exercised its discretion on the subject. If that court meant to decide upon the law, it decided incorrectly. The judge of probate did not proceed in this case, because the guardians had abused their trust, but because he considered that the resignation of one guardian, operated as a removal of the other.

In this view, he was manifestly wrong. Letters of guardianship create a trust, coupled with an interest. When two are appointed, and one of them dies, the trust survives. It is so when administration is granted to two. The law is the same as to joint guardians and joint administrators. *Eyre v. Countess of Shaftsbury*, 2 Peere. Williams, 102. *People v. Byron*, 3 Johns. cases, 52, 2 Dane, 40.

*431 *The bonds which are required, and given by guardians and administrators, are subject to this known principle of the law. The sureties enter into the obligation with a knowledge of their liability, for the acts of both, or either, or the survivor. There is nothing in the probate act which either contravenes or repeals this principle of the common law. The court of probate, may in some cases, put an end to the powers of both or either, in cases where the powers would not otherwise cease,—but when the authority of one ceases or is extinguished, that of the other remains.

The court of probate, in the case before us, evidently proceeded upon mistaken grounds, and but for that mistake of this principle of law, we have no reason to believe they would have discharged the guardians and appointed others. It will not be necessary for us to examine witnesses to determine whether the guardians have properly, or improperly exercised their trust, as it does not belong to this court either to grant letters of guardianship or administration, or to take bonds.

The decree of the court of probate must be reversed, as that court evidently mistook the law, in discharging or removing the guardians, and the guardians will remain, until the court of probate determine that they are unsuitable or incapable.

The decree, appointing another guardian, will of course be reversed, and this judgment is to be certified to the probate court.

BOOTH et al. v. WILKINSON.

(47 N. W. 1128, 78 Wis. 652.)

Supreme Court of Wisconsin. Feb. 3, 1891.

Appeal from circuit court, Grant county.

E. M. Lowry and Bushnell & Watkins, for appellants. W. E. Carter, for respondent.

ORTON, J. The appellants are the heirs at law of William Booth, deceased. Two of them are of age, and one still a minor, who appears by guardian ad litem. The respondent was their general guardian. Their mother, Mrs. Booth, had removed to Nebraska with her children, and had there been appointed guardian of the one infant heir, and the monies belonging to the heirs had been sent to her there, by the respondent, when received by him. The respondent had sold a farm belonging to their estate, as guardian, to one Hitton, for about \$11,000, on notes secured by mortgage, all of which, and interest thereon, had been paid to the respondent, except the last two, amounting to \$2,000, and the money had been sent to Mrs. Booth, in Nebraska. The respondent had been notified by the county judge to make final settlement of his guardianship on the 12th day of February, 1884, and he therefore called on Mr. Hitton to pay the last two notes, and Hitton looked around to borrow the money, and said that he could get it of one Mr. Harmes. Harmes called on the respondent on the 20th or 22d of January, to see in what shape he wanted the money. Harmes said it was in the Platteville Bank, and the respondent said: "If it is in the bank, it would be best to leave it there;" and that he would not want it until February 12th, the time of such settlement, and that he would then have to get a draft to send to Mrs. Booth, and it would be right there. Harmes then got a certificate of deposit, and turned it over to Hitton, and Hitton delivered it to the respondent on the 28th day of January, 1884. The following is a copy of the certificate: "Platteville, Wis., January 24, 1884. John Harmes has deposited in this bank two thousand dollars, payable to the order of David Wilkinson in current funds, on the return of this certificate properly indorsed. [Signed] O. F. Griswold, Cas." The respondent held the certificate for the purpose of having it present on the 12th or 13th day of February, the day of final settlement. On the 8th day of February the bank broke, and the money was lost. On said settlement the respondent was credited and allowed by the county court this \$2,000. On appeal to the circuit court said judgment was approved by proper findings of fact and conclusions of law, and from that judgment this appeal is taken.

I have stated the facts about the delivery of the certificate according to the testimony of the respondent. This statement of the facts relates only to this certificate of deposit, as this is the only subject of contention on this

appeal. I have stripped the case of everything not material to the only question on this appeal. Nothing omitted would affect the question. It does not appear that the respondent directed how the certificate of deposit should be drawn, but he knew when he received it how it was drawn, and accepted it in its present form. He knew that the deposit stood on the books of the bank to his own personal credit. It could not be known by the books of the bank that this was trust money, and not his own. The rule may be technical and arbitrary to some extent, but it is based upon the soundest principles of business economy and integrity, and approved by the highest courts of this country and of England with such a unanimity of judgment as to make it an established principle of law, that, if a guardian deposits the money in his hands belonging to the heirs in a bank in his own name, and to his own credit, without any ear-marks or indicia to distinguish it as the money of the heirs, or of the estate or trust funds, and the bank fails, it will be held to be his own personal loss, and not that of the heirs. No circumstances will justify it if such is the character of the deposit. It is not a question of good faith or of integrity—it is a question of naked fact—which determines its legal character. The reason of the rule is obvious. The following extract from the opinion of Judge Porter in McAllister v. Com., 30 Pa. St. 536, expresses, once for all, the rule, and some of the reasons of it: "If he [the trustee] undertakes to make a deposit in a banking institution, the entry must go down on the books of the institution, in such terms as not to be misunderstood, that they are the funds of the specific trust to which they belong. He cannot so enter them as to call them his own to-day, if they are good, and to-morrow, if bad, ascribe them to the estate, or shift them in an emergency from one estate to another, or by the deposit secure the discount of his own note, and have the deposit snatched at by the bank, if the note be not paid, or attached by a creditor as the depositor's individual property. * * * No matter what he intends to do, or what the cashier or clerk may think he is doing, the deposit must wear the impress of the trust, or he cannot, when brought to account, call it trust property." This was the exact condition of this fund, and all the reasons of the rule are applicable to it as the personal and individual deposit of the respondent. The rule is inflexible, and there is not in this case a single circumstance which makes the rule inapplicable to it. This is all that need be said in this case, for this court has sanctioned the rule in a recent case, where the depositor informed the teller of the bank, who gave the certificate of deposit, that they were trust funds, and did not belong to him. In Williams v. Williams, 55 Wis. 300, 12 N. W. 465, and 13 N. W. 274, Mr. Justice Cassoday marshaled and passed in review the leading authorities of this country and of England, and sanctioned

the rule in a case that rules this in all essential particulars. The loss in this case was that of the respondent, and not that of the heirs, or their guardian in Nebraska; and therefore the respondent should be charged with this \$2,000

in the settlement of his guardianship. The judgment of the circuit court is reversed, and the cause remanded, with direction for further proceedings in accordance with this opinion.

Appeal of BALTHASER.
(19 Atl. 408, 183 Pa. St. 338.)

Supreme Court of Pennsylvania. March 17,
1890.

Appeal from orphans' court, Berks county;
Hiram H. Schwartz, Judge.

C. H. Schaeffer, for appellant. Rieser &
Schaffer, for appellee.

PER CURIAM. We would gladly relieve this guardian from the surcharge of \$142, if we could do so consistently with our duty, but we cannot. The learned judge of the orphans' court has found, upon abundant evidence, that he was guilty of supine negligence, and that the money due his ward from Maria Elizabeth Faust was lost in consequence thereof. Had reasonable diligence been used it could have been collected. The guardian made no serious effort to collect or secure it. Moreover, he allowed the \$92.97, surplus remaining in the assigned estate of the said Maria Elizabeth Faust, to be dis-

tributed to the assignor; and also allowed \$360.62 to be distributed to the heirs of said Maria. It may be the guardian had no knowledge of these matters; he says he had not, and it may be so. But he should have known and would have known it, if he had paid even reasonable attention to the duties of his trust. While a court is always loth to surcharge a trustee with money that never came into his hands, and exacts from him only reasonable and ordinary care in such matters, it will not do for a guardian to utterly neglect his duties in the care and management of his ward's estate. Ordinary prudence in this instance would have saved his ward's money, and we are not measuring his responsibility by any higher standard. It is not too much to say that, had this been his own money, in all probability it would not have been lost; and he ought not to have been less vigilant in his ward's interest than he would have been in his own. The decree is affirmed, and the appeal dismissed, at the costs of the appellant.

BORUFF v. STIPP.

(25 N. E. 865, 128 Ind. 82.)

Supreme Court of Indiana. Nov. 14, 1890.

Appeal from circuit court, Lawrence county; E. D. PEARSON, Judge.
Palmer & Crook, for appellant.

OLDS, J. This is an action brought by John B. Stipp, as guardian of Isis G. Adams, against the appellant, for the possession of an organ alleged to be the property of appellee's ward, and that said appellee is entitled to the immediate possession of the same; that it is of the value of \$28, and is unlawfully detained, etc. Appellant demurred to the complaint, which was overruled, and exceptions. The only question presented is as to the right of the guardian to maintain an action for the possession of personal property belonging to his ward. It is contended by counsel for the appellant that the guardian has no right to maintain the action, but that the action must be brought in the name of the ward by his next friend, and we are cited to some authorities which, it is contended, sustain this theory, but we do not think they support the contention of counsel. An action of replevin is a possessory action, and the statute provides that it may be maintained by any person having the right to the immediate possession of the property. Sections 1266, 1267, Rev. St. 1881. In *Pacey v. Powell*, 97 Ind. 371, it is said: "It is true, also, that the mere possessory right to personal property may prevail against the absolute legal title thereto when such title and the right of possession become separated, and are held by different parties." Section 2512 provides that "the court having probate jurisdiction in each county in term-time, or the clerk thereof in vacation, shall appoint guardians of minors, residents in such county, or having estates therein: and, in case of conflict

between two appointments in different counties, the one first made shall exclude all others, and extend to all the property of the ward within this state." Section 2518 gives to the guardian the management of the minor's estate during minority. It would seem that there could be no doubt but that the guardian has the right to the custody of the personal property owned by the ward. Without the right to its custody, he would be unable, in many instances, to comply with the statute, and manage the estate of the ward; and, having the right to the possession, he may maintain an action for its possession. We are referred by counsel to sections 255-258, of the Revised Statutes of 1881, giving to the infant the right to maintain an action by next friend; but we do not deem these sections as controlling the manner in which an action for the possession of personal property shall be prosecuted. The right of action for the possession is not necessarily in the infant, when he has a legally appointed guardian claiming the possession and custody of the personal property. No doubt an infant may, by his next friend, in some instances, prosecute an action for the possession of personal property; but the guardian, having the custody of the infant and the management of his estate, may also prosecute an action for the possession of personal property owned by his ward. Having the right to the control and management of the property, he must, as a necessary incident, have the right to recover possession of such property from one unlawfully retaining the possession of the same. It certainly does not lie in the mouth of one who unlawfully retains possession of the property of the ward, and deprives the guardian from managing and controlling the same, to say that he has no right to sue for and recover the possession when the infant is making no objection. There is no error in the record. Judgment affirmed, with costs.

WASHABAUGH v. HALL.
(56 N. W. 82, 4 S. D. 168.)

Supreme Court of South Dakota. Aug. 19, 1893.

Appeal from circuit court, Pennington county; William Gardner, Judge.

Action by Frank J. Washabaugh against Herbert S. Hall. Plaintiff had judgment, and defendant appeals. Affirmed.

Schrader & Lewis, for appellant. G. Q. Moody and J. W. Fowler, for respondent.

KELLAM, J. This action was brought to recover the \$500 paid by respondent to appellant referred to in a writing, whose execution and delivery are conceded, and reading as follows: "Exhibit B. Rapid City, Dakota, December 30, 1885. Received of Frank J. Washabaugh the sum of \$500 cash, and his promissory note for the sum of \$500, bearing even date herewith, and drawing interest at the rate of ten per cent. per annum, which said note and cash are in full payment for a one-sixteenth interest in and to the southeast quarter of section 25, township 2, north range 7, east B. H. M., provided Herbert S. Hall, to whom the cash is paid and note delivered, shall perfect title to the same above-described land in himself, within sixty days from the date hereof; otherwise to be refunded to the said F. J. Washabaugh. H. S. Hall." Plaintiff had judgment, and defendant appeals.

Upon the trial it was sufficiently shown that much more than the 60 days mentioned in the writing had elapsed; that appellant had not perfected title in himself, as we shall presently see; and that respondent had demanded a return of the \$500 paid, which was refused. In his defense, appellant pleaded, and on the trial made an effort to show, that in receiving said money, and in securing the title to said land, or trying to do so, he was acting as the agent of respondent and others, with no understanding on the part of either that he was assuming any independent obligation to procure such title, or any understanding that it would be a good title when so procured; so that if, acting in good faith and upon his best judgment, he procured the best title he could obtain, though not a perfect one, he had discharged his duty as agent, and the loss should fall upon the principal, and not upon him, the agent. The exclusion of such evidence is the first ground of error assigned. We think the trial court was right. Appellant by executing and respondent by accepting this writing had agreed to it as correctly defining their relations to each other. It was not ambiguous in meaning, nor was there any claim that it was given or obtained through mistake, accident, or fraud. The legal effect was that of an agreement executed on the part of one, executory on the part of the other. The contest was between the very parties to it. To allow it to be shown on the trial that it was not intended to be,

and was not in fact, what it purported to be, would violate one of the first and most elementary rules of evidence. Sections 3553, 3554, Comp. Laws; *Dean v. Bank*, 6 Dak. 222, 50 N. W. Rep. 831; *Thompson v. McKee*, 5 Dak. 172, 37 N. W. Rep. 367; *Van Brunt v. Day*, 81 N. Y. 251.

Appellant contends, however, that the evidence presented by him showed that he had perfected title in himself, and that, therefore, respondent could not reclaim the money paid. The whole tract consisted of 160 acres. It appears that, at the time of the payment of this money and the execution of the writing, the title to this land was still in the United States government; that afterwards a patent for one 80 of the same was issued to "J. Carlos Stevens, minor orphan child of Silas B. Stevens, deceased;" that, prior to the issuance of said patent, one Eliza A. Center, describing herself as "guardian of J. Carlos Stevens, minor orphan child of Silas B. Stevens, deceased," had made a power of attorney authorizing the attorney therein named "to sell said lands or any interest therein, and to make any contract in relation thereto which I [she] might make if present;" the land so referred to being the 80 afterwards patented as above stated to the minor orphan, J. Carlos Stevens. Under the authority of this power, the attorney named, prior to the issuance of the patent therefor, executed a conveyance in the name of said Eliza A. Center, as guardian, of "all her estate, right, title, and interest, claim, property, and demand of, in, and to" the said land, to one Whitfield, who had already by warranty deed conveyed the same to said appellant, Hall. Did the title thus acquired by Hall substantially meet the condition upon which the deposit of \$500 by respondent was to become a payment on the purchase of the land? That is, was the title thus perfected in Hall? It is noticeable that, in the conveyance to Whitfield, Eliza A. Center, although she describes herself as the guardian of J. Carlos Stevens, who was the real owner, does not assume to convey his interest, but her own. In terms, at least, it is her interest in the property, and not her ward's, which she undertakes to convey; but, passing this, as guardian she had no authority to sell her ward's real estate, unless so directed by a competent court. No such authority was shown, and none claimed. Without it the deed was inoperative as a conveyance of real estate. This is both statutory and common law. Section 6009 et seq., Comp. Laws; 9 Amer. & Eng. Enc. Law, p. 130, and cases cited.

It is contended, however, that the claim of the minor was personal property, and could be sold and transferred by the guardian, and in respect to the character of the property this contention is supported by *Mullen v. Wine*, 26 Fed. Rep. 206, and *Webster v. Luther*, (Minn.) 52 N. W. Rep. 271, but this does not avoid the difficulty in this jurisdiction. Considered as an attempted sale of the

personal property, the transaction would be controlled in its legal effect by the statute of this state, unless it was shown that it took place elsewhere, and it does not so appear from the record. Assuming that Eliza A. Center was the duly-appointed guardian of J. Carlos Stevens, she had no authority, simply because she was such guardian, to dispose of the personal estate of her ward. Our statute provides when and how the personal property of a minor may be sold by the guardian, and there was no attempt to bring this case within such statutory conditions, or to show the circumstances under which the sale was made. To hold this a good and valid transfer would be to hold that any guardian, simply by virtue of his relation to his ward, is authorized at will to sell and dispose of the personal estate of such ward. We cannot so hold under our statute. See sections of the Compiled Laws last above cited. We are very clear that, upon the facts disclosed, the trial court was right in holding that appellant had not perfected in himself title to this land.

It was in evidence that respondent had renewed his four-months note referred to in the writing above set out, and appellant claims that this was a ratification of his acts in taking the title which he did take, and a waiver of respondent's right to demand a return of the money paid. This does not necessarily follow. The note was due, and was apparently in the hands of the Black Hills National Bank. It must either be paid or renewed, or its return demanded, and the land purchase abandoned by respondent. His renewal under these circumstances—and nothing more is shown—is quite consistent with his willingness to allow appellant further

time in which to procure a satisfactory title, leaving the \$500 paid to appellant, and respondent's relation to it, in *status quo*. The reasons for the renewal, or the circumstances under which it was made, are not disclosed by the record, and we cannot assume that more was intended than the simple fact necessarily means.

It is next contended that this action for the return of the \$500 could not be maintained on account of a partial failure of title, but that it must be complete to entitle respondent to a return. To support this proposition cases are cited, like *Greenleaf v. Cook*, 2 Wheat. 13, holding that where a promissory note is given for the purchase of real estate, and the transaction executed by receipt by the grantee of a deed therefor, a partial failure of consideration, such as the existence of an incumbrance, does not constitute any defense to the note in an action at law. Without referring to the many cases in which the law has been held otherwise, it is sufficient to say that this is not such a case. Here the respondent paid the money to appellant, and appellant received it upon the express condition that, if he did not perfect the title in himself to the land described within the time limited, he should refund the money so paid to respondent. To say that he might retain the money if he perfected in himself the title to one-half the land would require the court to destroy the agreement the parties had made, and substitute another in its place. Upon the record presented to us, we think respondent was entitled to a substantial compliance with the condition of appellant's agreement, or a return of the money. The judgment is affirmed, all the judges concurring.

JENNINGS v. JENNINGS et al. (No. 18,278.)
 (37 Pac. 794, 104 Cal. 150.)

Supreme Court of California. Sept. 21, 1894.

Commissioners' decision. Department 2 Appeal from superior court, Tehama county; John F. Ellison, Judge.

Action by W. O. Jennings, Jr., by his guardian, against W. O. Jennings, Sr., Frank G. Waterhouse, and others, to foreclose a mortgage. Judgment was rendered for plaintiff, and defendant Waterhouse appeals. Affirmed.

Holl & Dunn, for appellant. A. M. McCoy, H. P. Andrews, and James P. O'Brien, for respondents.

BELCHER, C. On March 5, 1887, W. O. Jennings, Sr., was appointed guardian of the estate of his minor son, W. O. Jennings, Jr., and thereafter he duly qualified and entered upon the discharge of his duties as such guardian. On the 23d day of the same month he received for and on account of his said ward the sum of \$1,000 in money, which he thereafter held and used until April 9, 1889. On the last-named day he executed to his ward his promissory note for \$1,204.17, being for the said \$1,000 and interest thereon to that date at the rate of 10 per cent. per annum, compounded annually, and also a mortgage upon certain real property to secure payment of the note; and on the same day he caused the mortgage to be properly recorded in the records of the county, and shortly thereafter delivered both the note and mortgage to the mother of the boy, to be kept by her for him. On April 28, 1890, while he was still the guardian of the boy, he undertook to satisfy and discharge the said mortgage, and to that end made and entered upon the margin of the record thereof an indorsement as follows: "State of California, County of Tehama--ss.: Full satisfaction of this mortgage is hereby acknowledged this 28th day of April, A. D., 1890. W. O. Jennings, by Guardian of W. O., Junior. Attest: W. R. Hall, Recorder." On July 21, 1890, he and one Barnes executed to Frank G. Waterhouse their joint promissory note for \$2,500, and a mortgage on the premises covered by the mortgage to the boy, and certain other real property, to secure payment of said note, which mortgage was also duly recorded. He continued to be the guardian of his son until August 19, 1891, when, by an order of court, he was removed, and his letters of guardianship were vacated and annulled. And at the same time A. J. McClure was duly appointed guardian in his place, and he was by the court ordered and directed to turn over to McClure all the property and estate belonging to his said ward. On March 21, 1892, W. O. Jennings, Jr., by his guardian, A. J. McClure, commenced this action to foreclose his mortgage of April 9, 1889, alleging among other things, that the note se-

cured thereby was due and wholly unpaid; that the attempted satisfaction of the said mortgage was invalid and void, and made without any authority or power in the said W. O. Jennings, Sr., so to do, and without any consideration whatever; and that the interest of the defendant Frank G. Waterhouse in the said premises, as mortgagee, was subsequent and subject to the lien of plaintiff's mortgage. The defendant Waterhouse demurred to the complaint upon several grounds, and his demurrer was overruled. He then answered, denying many of the averments of the complaint, and, among others, that the attempted satisfaction of plaintiff's mortgage was invalid and void, and setting up his own note and mortgage, and praying that they be adjudged to be a first lien upon the premises described in the complaint. After trial the court found the facts very fully, and, among others: "That the aforesaid satisfaction undertaken to be made and purporting to be made, and the said indorsement upon the margin of said record, were made and executed without any order or other authority of the court so to do, and without the said indebtedness, or any part thereof, having been paid, discharged, or in any way satisfied; and the said purported satisfaction of mortgage and the said indorsement upon the margin of said record were, and each of them was, wholly invalid and void, and of no legal force and effect. * * * That the said mortgage is now, and at all times since the said 9th day of April, 1889, has been, in full force and effect upon and against the land contained and described therein. That neither said note nor mortgage, nor any part of the principal sum therein mentioned, nor of the interest thereon, has ever been paid, and said mortgage has never been paid nor satisfied nor discharged." That the note and mortgage set up in plaintiff's complaint in this action were made for a valuable consideration, and were delivered as in these findings hereinbefore stated; and said note and mortgage were accepted by the mother of plaintiff for and on behalf of plaintiff, and it is for the interest of plaintiff that he should accept and receive said mortgage." Judgment was accordingly entered foreclosing the plaintiff's mortgage, and directing the sale of the mortgaged premises, and the application of the proceeds, after paying costs, expenses, and attorney's fees, to the payment of the amount found due the plaintiff; and from this judgment the defendant Waterhouse appeals.

1. The demurrer was properly overruled. The complaint stated facts sufficient to constitute a cause of action, and was not obnoxious to any of the objections raised to it.

2. The appellant contends that the note and mortgage were given to secure payment of money already secured by the guardian's bond, and hence were without consideration; and also that when the mortgage was made the accounts between the guardian and his

ward had not been settled, and the amount of the indebtedness established, by a competent court, and therefore the mortgage never had any validity. This contention cannot, in our opinion, be sustained. The note and mortgage were given for money which was the property of the mortgagor, and for which the mortgagor was personally responsible. This constituted a sufficient consideration for making the papers, and the fact that the mortgagor was the guardian of the estate of the mortgagee, and had given a guardian's bond, did not in any way affect the question. He had a right to give further security if he chose to do so. Nor was it necessary that the amount of the indebtedness be fixed and determined by any court in order to give validity to the mortgage.

3. The appellant further contends that the note and mortgage never became valid and binding obligations, because they were never delivered to any person authorized to receive them for the plaintiff. This contention is also, in our opinion, untenable. The case shows that the papers were properly executed, and the maker at once caused the mortgage to be duly recorded, and then delivered them both to plaintiff's mother for him. This, under the decisions in this state and elsewhere, constituted a sufficient delivery. In *De Levillain v. Evans*, 39 Cal. 120, the question arose as to the acceptance of a deed of gift of certain real property, and it was held that, "if the donee be of mature years, he will be presumed to have accepted it, if it be for his advantage, unless the contrary appears;" and that, "if the donation be to a minor, and to his advantage, the law accepts it for him." In *Wedel v. Herman*, 59 Cal. 515, it is said: "But it is contended that the court below erred in overruling objections made to the offer in evidence of the deed to the plaintiff from his father, on the ground that it was not delivered. The deed was produced by the plaintiff. It was a deed from father to son. It showed that it had been duly acknowledged and recorded at the request of the grantor, and these constituted sufficient proof of delivery." In *Cecil v. Beaver*, 28 Iowa, 241, the court, by Dillon, C. J., said: "Where the deed to a child is absolute in form and beneficial in effect, and the grantor and father voluntarily causes the same to be recorded, this is, in law, a sufficient delivery to the infant, and the title to the lands will pass thereby. In such case actual, manual delivery and a formal acceptance are not necessary." And see, also, *Rivard v. Walker*, 39 Ill. 413; *Mitchell v. Ryan*, 3 Ohio St. 377; *Spencer v. Carr*, 45 N. Y. 406; *Gregory v. Walker*, 38 Ala. 26.

4. The only other question which need be considered is that relating to the attempted satisfaction of the mortgage by the mortgagor. A similar question arose in the case of *Aldrich v. Willis*, 55 Cal. 81. In that case Henry M. Willis received and appropriated to his own use money belonging to his in-

fant daughter, Amelia. For the money he executed to Amelia his promissory note, and a mortgage to secure its payment, which he caused to be duly recorded. Subsequently, "acting as guardian," he entered upon the margin of the record a satisfaction of the mortgage, and then mortgaged the property to another party. At the time he received the money, and up to the time of the trial, he was acting as guardian of Amelia, but in fact he was not the guardian of her estate, never having received letters of guardianship, nor qualified as such. In department, this court, by McKinstry, J., said: "Nevertheless, Henry M. Willis was a trustee, holding the money of the infant, Amelia, Jr., which came into his hands in trust for her. The mortgage executed by him to secure such moneys was altogether for her benefit, and the fact that it is set up in her answer by her guardian ad litem, and relied upon herein, constitutes sufficient proof of delivery to and acceptance by her." And it was held that the mortgage was not satisfied, but was still in full force and effect. On petition for rehearing in bank, the court, by Thornton, J., delivered an opinion, concurred in by four other justices, in which, referring to the language above quoted, it is said: "To which we desire to add: 'And this must be so, since, if it [the mortgage] had not been for the benefit of the infant, the court below, it must be presumed, as it had control over the conduct of the guardian ad litem, would not have allowed him to set it up.'" And the opinion closes with the following statement: "Whether Henry M. Willis was guardian or not we consider immaterial. The same result follows whether he (Willis) was or was not the general guardian of the infant, Amelia Willis." It is earnestly claimed for appellant that the language last above quoted was entirely obiter, and should be disregarded; but we cannot see it in that light. Conceding that the statement was not necessary to a decision of that case, still we think it declared the law applicable to the case correctly. To hold otherwise, and say that a guardian, without any authority of court, and without the payment of the indebtedness, can, at his pleasure, satisfy and release a mortgage given by him to his ward, might greatly endanger the estates of wards, and lead to results not contemplated or authorized by law. Applying the rule declared in that case to this, it must be held that Jennings, Sr., under the circumstances shown, had no right to satisfy the mortgage to his ward, and that the attempted satisfaction of it was ineffectual and void. We find no errors in the record calling for a reversal, and therefore advise that the judgment be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

SMOOT v. BELL.

(Fed. Cas. No. 13,132, 3 Cranch, C. C. 343.)
Circuit Court, District of Columbia. Nov.
Term, 1828.

This was an appeal from the sentence of the orphans' court in Alexandria, ordering the former guardian, George H. Smoot, to pay over to the new guardian, Gideon Bell, chosen by the ward after the age of fourteen, money which Smoot had received in Pennsylvania under letters of guardianship taken out there, upon his giving bond and security to account there.

Mr. Taylor for the appellant. The orphans' court in Alexandria has only the same powers which the orphans' court of Maryland has; and in the case of Mauro v. Ritchie [Fed. Cas. No. 9,312],¹ in Washington, at May term, 1822, this court decided that the orphans' court cannot appoint a new guardian upon the election of the ward at his age of fourteen; so that Mr. Bell is not guardian, and has no right to call Mr. Smoot to account.

Mr. Hewitt, contra, cited Toler, 134, which cites a case from Sergeant and Rawle; and contended that as Mr. Smoot had voluntarily charged himself with the money in his account with the orphans' court here, he is bound to account for it here.

CRANCH, Chief Judge, delivered the opinion of the court (nem. con.), as follows:
In this case it is admitted that Mr. Smoot

was duly appointed by the orphans' court, guardian of the infant before his age of fourteen years. This appointment must have been made under the power given to that court by the Maryland law, which was in force on the 27th of February, 1801, when the orphans' courts of this district were erected. By that law of Maryland, the guardian appointed by the orphans' court is appointed until the infant arrive at the age of twenty-one, and the infant has no right, at the age of fourteen, to choose another. This point was decided by this court at Washington, in the case of Mauro v. Ritchie [supra], about eighteen months ago. Mr. Smoot, therefore, still remains guardian, and Mr. Bell has no authority to call him to account.

The next question is, whether Mr. Smoot is bound to account to the orphans' court here for the funds which he received in Pennsylvania under his appointment there under the laws of Pennsylvania, and which he there bound himself to account for in the courts of Pennsylvania. We think he is not bound to account to the orphans' court here for that fund, although, under a mistake of his obligation, he may have given credit for it in his first account with that court. In his second account he is credited with that fund, as having been improperly charged with it in his former account. In his third account he is again charged with it by the orphans' court, and is required to pay over the balance to Mr. Bell; from which order he, Mr. Smoot, has appealed to this court.

We therefore think that the sentence of the orphans' court ought to be reversed, with costs.

¹ 3 Cranch, C. C. 147.

LINE et al. v. LAWDER et al.

(23 N. E. 758, 122 Ind. 548.)

Supreme Court of Indiana. Feb. 7, 1890.

Appeal from circuit court, Huntington county; H. B. SAYLER, Judge.

Cobb & Watkins and Kenner & Dille, for appellants. Branyan, Spencer & Branyan, for appellees.

MITCHELL, C. J. This proceeding was instituted by Nettie S. Lawder and her husband, to set aside the final settlement report of her former guardian, Benajah A. Line. It appears from the complaint that the ward was united in marriage before she attained her majority to Joseph Lawder, who was more than 21 years old. After her marriage the guardian obtained from his ward and her husband a release, and receipt in full for the amount which he informed them remained in his hands as guardian. It is averred, in substance, that he obtained the receipt by representing that he had in his possession available securities belonging to his ward, which he promised to collect, and pay over the amount due, before making a final settlement and obtaining his discharge as guardian; and that, in violation of his agreement, he presented his final account to the court, and obtained his discharge, without paying the amount due, or delivering to his ward, or to any one on her behalf, anything of value on account thereof. The evidence tends to show that at the time the instrument, which is both a receipt and release, was obtained, the appellant, who was the uncle of the ward, represented to her and her husband that certain notes which were payable to him as guardian, and which were not yet due, were good, available securities, and that they represented the entire amount of his ward's estate. Relying upon these representations, the notes were accepted, and a receipt in full was signed by the ward and her husband. The notes were immediately delivered back to the appellant, who agreed to collect them without any charge, and pay over the money to the ward's husband. Nothing was ever collected, and, so far as appears, the makers of the notes were insolvent, and the securities were practically of no value. Although payable to the guardian, they do not appear to have been taken for trust moneys loaned by him, but for property sold belonging to him, or in his own personal transactions, in his individual business. One of the notes was put into judgment by the appellant while acting as the agent for the plaintiffs. The other two were afterwards delivered to the ward's husband, and were surrendered at the trial, and deposited with the clerk, by order of the court, for the appellant's benefit. It was adjudged that the confirmation of the final report and the order discharging the guardian be set aside, and the latter was ordered to present an account to the court for final settlement.

It is contended that the evidence does not sustain the material averments of the complaint, and that it was not sufficient to justify the order and judgment from which this appeal is prosecuted. The re-

ceipt and release relied on by the appellant was not taken in pursuance of a settlement made in the presence of the court. A guardian who makes an informal settlement with and obtains a release from his ward assumes the burden of making it clearly appear that he fully and fairly disclosed the condition of the ward's estate at the time of the settlement, and that he paid over the amount found due, either in money or in such securities as had been taken in pursuance of the order of the court, or in the exercise of such diligence and prudence as men display in the conduct of their own affairs. The burden rests upon the guardian to show affirmatively that he exercised the required degree of care in taking the securities which he turned over to his ward, or that they were good beyond peradventure, and that they will be collectible when they fall due. *Slauter v. Favorite*, 107 Ind. 291, 4 N. E. Rep. 880, and cases cited. Before such a settlement shall be an exoneration, he is also bound to make full disclosure to the court of the settlement and manner of payment, without any concealment or misrepresentation. A settlement out of court, without turning over to the ward the money, property, or securities which actually constitute the trust-estate, is not such a settlement as will stand in a court of equity, when seasonably assailed. *State v. Greensdale*, 106 Ind. 384, 6 N. E. Rep. 928; *Manning v. Manning*, 61 Ga. 187; *Schouler, Dom. Rel.* § 388, note; *Id.* §§ 372, 378.

While the notes turned over to the ward in the present case were nominally payable to the guardian, the evidence tends to show that they were taken for the most part, at least, in his own personal transactions, and not for the loan of funds constituting the trust-estate. Besides, it does not appear that the loans, if the notes were taken for loans, were prudently made upon collateral or any other adequate security. Loans made on the credit of individuals or firms, without security or with doubtful security, are ordinarily at the risk of the guardian. *Wyckoff v. Hulse*, 82 N. J. Eq. 699; *Estate of Post*, 57 Cal. 278; *Schouler, Dom. Rel.* § 353. A guardian, it is true, is not an insurer of the safety of investments made by him, nor is he to be held to an extraordinary degree of care; but, in order that he may be exonerated from loss on account of insolvent securities taken in the course of the guardianship, it is his duty to keep the trust-estate separate from his own funds, and to act in good faith, and observe that sound discretion and prudence usually exercised by diligent men about their own business. In making loans of the trust funds it is his duty to take security. A loan made in good faith, and in the exercise of ordinary care and prudence, upon security which seemed ample at the time, will not be at the personal risk of the guardian, if, on account of changed circumstances or depreciation in values, loss subsequently occurs. *State v. Slevin*, 93 Mo. 253, 6 S. W. Rep. 68. Where adequate care is observed, and the condition of the estate and the character of investments are truthfully reported to the court, as the

law requires, a guardian may relieve himself and his sureties by turning over the estate to his ward, who has attained his majority, in the condition in which it actually exists at the time a settlement is made. Where a settlement is thus made, and it afterwards turns out that securities so taken and turned over were worthless, in order to justify a cancellation of the settlement, there must appear to have been negligence or bad faith on the part of the guardian. *Hardin v. Taylor*, 78 Ky. 593. Where, however, unsecured notes, the makers of which are of doubtful solvency, have been taken in the individual transactions of the guardian, in the manner already described, and where these have been accepted in lieu of money, upon the faith that they were available solvent securities, it requires a degree of assurance to insist that the receipt and release of the ward should now be a bar to the opening up of the final settlement. *Breneman's Appeal*, 121 Pa. St. 641, 15 Atl. Rep. 650.

It is contended that there is no evidence in support of the averment in the complaint that the appellant agreed not to present the receipt and obtain his discharge from the court until after he had collected and paid over the money represented by the notes in question. Hence it is argued the motion for a new trial should have

been sustained, because the material averment in the complaint, or upon which the application was predicated, was not proved. This view cannot prevail. Whether the appellant actually and in terms made such an agreement as is averred or not, the law made it his duty to withhold the receipt and the release, and not secure his discharge as guardian until the money due his ward was paid over. He will not now be heard to say that he did not agree to do that which the law and good conscience required of him.

Finally, it is contended that the ward must fall because the notes were not tendered back before the application to set the settlement aside was made. This view was not sustained. This was not an ordinary action at law, which required, as a condition precedent to its maintenance, that a contract under which something of value had been obtained should be rescinded. There was no contract to rescind, and the principles applicable to cases of the class cited are not controlling in a proceeding to set aside a final settlement report of a guardian. In such a case, if the ward offers to return whatever may have been received, at the hearing, as in cases of equitable cognizance, it will be sufficient. *Higham v. Harris*, 108 Ind. 246, 8 N. E. Rep. 255. There was no error. The judgment is affirmed, with costs.

ELA v. ELA.

(24 Atl. 893, 84 Me. 423.)

Supreme Judicial Court of Maine. March 31,
1892.

Report from supreme judicial court, Sagadahoc county.

Appeal by Alfred Ela from a decree of the probate court allowing the account of Lucia Ela, his guardian. Decree affirmed.

Williams & Wood, for appellant. W. L. Putnam, for guardian.

HASKELL, J. One question is whether a guardian may interpose the release of his ward, given after he is of age, as a defense in the probate court to a citation for the settlement of his account.

Probate procedure, in this state, should be conducted upon the rules of the broadest equity, whenever the provisions of statute do not conflict with that view. Substantial justice should be awarded by methods conducive to economy and dispatch, and without unnecessary circuity of action or prolixity in procedure.

Probate appeals give opportunity for the settlement of issues of fact by a jury, as in actions at law, as well as afford complete consideration of the cause under the beneficent rules of chancery procedure, elastic enough to meet the varied conditions likely to arise in such matters; so that, from inability to properly deal with the defense here set up, there is no necessity of requiring it to await an action at law on the bond, and compel prolix and perhaps vexatious litigation over the settlement of probate accounts, that in the end may amount to naught. It is much better, in the first instance, to determine the guardian's liability to account, than, after a long struggle at accounting, to hold it need not have been done at all.

Failure to account when required by statute or by the judge of probate is a breach of a guardian's bond. *Pierce v. Irish*, 31 Me. 254. When such account is offered for settlement or the guardian has been cited to account, the whole matter is within the jurisdiction of the probate court, and must there be dealt with. It is of no consequence whether the rights of the parties are determined upon an issue raised on answer to the citation, as in *Wade v. Lobdell*, 4 Cush. 510, or upon a statement of account filed in pursuance of a decree thereon, requiring an account. In either case, the whole matter is open for the consideration of the judge of probate; for, if the issue be raised upon the citation, and a settlement with the ward be interposed or his release

pleaded, it is pertinent that the court consider the actual condition of the estate as bearing upon the fairness of the settlement or the validity of the release. All such settlements should be subjected to the closest scrutiny, to make sure that the ward has not been overreached or defrauded. So in *Wade v. Lobdell*, supra, the receipt in full settlement having been allowed as a bar to the citation, without requiring the guardian to testify as to its consideration, on appeal, the case was remanded to the probate court, with directions to hear evidence touching the validity of the receipt, and to require the guardian to testify respecting his "account and the items thereof." The same doctrine is approved in *Wing v. Rowe*, 69 Me. 284.

Lucia Ela, in 1864, was appointed guardian of her four minor children, Margaret, now dead, Walter, Richard, and Alfred, the appellant. In 1873 the three oldest children, then of age, settled with their guardian. To Richard was intrusted the family estate, including that belonging to Alfred, the appellant. It was invested in manufacturing business in Cambridge, Mass. The business did not prove remunerative, and came to the hands of a trustee, who transferred it to Alfred in 1879, the next year after he became of age. He managed it until 1882, when, tired of it, he transferred it to his brother Walter, together with his supposed claim against Richard for losing his property, and released his mother from all liability to him as guardian, and received from her the deed of her house in Washington, D. C., of considerable value, which property he still holds under a conformity deed, received by him in 1890, while these proceedings were in progress. The appellant's release is under seal. When he made it he was 25 years of age, and aware of the financial straits of his family. He had been educated at Harvard, and had studied abroad. Three years' active business must have given him some experience in the realities of life. He has neither inexperience nor ignorance to offer in excuse. He must have well understood the effect and purpose of the release set up in defense. No fraud appears, and for seven years he slept on his rights.

A careful consideration of the whole evidence leads to the irresistible conclusion that the appellant should be held to abide the stipulations of his own deed, solemnly and understandingly made, without fraud or deceit.

Decree of probate court affirmed, but without costs.

PETERS, C. J., and WALTON, VIRGIN, EMERY, and FOSTER, JJ., concurred.

BARRETT v. PROVINCHER.

(58 N. W. 292, 39 Neb. 773.)

Supreme Court of Nebraska. March 21, 1894.

Error to district court, Fillmore county; Morris, Judge.

Action by John Barrett, guardian, against Joseph Provincher, to recover wages. From a judgment for defendant, plaintiff brings error. *Affirmed.*

F. B. Donisthorpe, for plaintiff in error. John Barsby, for defendant in error.

RYAN, C. This action was commenced before a justice of the peace in Fillmore county, Neb., by the plaintiff in error, John Barrett, as guardian of Alanson Barrett, against the defendant in error, for the recovery of \$72.30 for work and labor performed by Alanson Barrett for the defendant. The record recites that during the cross-examination of plaintiff it was developed that Alanson Barrett, his ward, was dead, and that thereupon counsel for the defendant moved the court to dismiss the case for the reason that the plaintiff had no legal capacity to

sue. The motion was sustained, and the cause dismissed at the cost of plaintiff.

The sole question presented in this court is whether or not, under the circumstances described, the plaintiff, as guardian, could maintain an action against the defendant for such sum as the defendant owed for labor of the deceased ward. Plaintiff relies upon *Stinson v. Leary*, (Wis.) 34 N. W. 63, and on *Huntsman v. Fish*, (Minn.) 30 N. W. 455. In neither of these cases was the ward dead; he had merely reached the age of majority; and it was properly held that, for the purpose of the adjudication of rights as between the ward and guardian, the relation continued until a settlement was made. In the case at bar, however, the relation was terminated by the death of the ward. For the collection of whatever sums that were due the estate of the deceased, an administrator or executor was the only representative party who could properly maintain the action. The judgment of the district court approving the proceedings in the justice court was right, and is affirmed. *Affirmed.*

POST, J., not sitting.

FIELD et ux. v. TORREY.

(7 Vt. 372.)

Supreme Court of Vermont. Windham. Feb.,
1835.

Exceptions from Windham county court.

In an action of account, a demurrer to the replication. The demurrer was sustained. The plaintiffs bring exceptions.

William C. Bradley, for plaintiffs. Hubbard & Aikens, for defendant.

COLLAMER, J. This is a plea to the jurisdiction of the court, insisting that the defendant was guardian, and that the whole jurisdiction in relation to her guardianship is exclusively in the probate court. The replication avers, that the defendant ended her guardianship by marriage, in 1826; and to this, the defendant demurs. This is not an objection to the form of the action, and it is therefore unnecessary to decide whether either or all of the counts should have been against the defendant, as guardian, or as bailiff; or to inquire whether that part which relates to the land should have been in Windsor county, for the plea does not insist on such a jurisdiction in Windsor county court. It is also unnecessary to inquire whether all of these counts can be sustained; for if any one of them can, under the circumstances stated in the plea and replication, then this plea to the jurisdiction must fail. In all pleas to the courts of general jurisdiction, it must be shown that there is another court of exclusive jurisdiction, in which effectual justice, to the full extent to which the plaintiff is entitled, may be administered. 1 Chit. Plea. 432, and the authorities there cited.

If the defendant's marriage did immediately, by operation of law, put an end to her guardianship, in 1826, and yet she continued to receive the rents and income until the full age of the ward, or until the commencement of this suit, the plaintiffs could not have entire remedy in probate, and this action must be sustained, or the plaintiffs are without redress, at least in relation to that part subsequent to 1826.

The counsel for the defendant insist, that inasmuch as the defendant's marriage was not noticed in the probate court, and she continued to act, she was still legal guardian. It is insisted that the probate court must pass on the subject, and find the marriage and decree on the subject, and that it is like the death, or incompetency, or removal of one joint administrator. The statute on these two subjects is entirely different. By the 34th section of the act constituting probate courts, it is provided that when any executor, administrator or guardian shall reside without the state, or neglect to account on proper notice, or neglect *387 to perform any decree of said *court, or shall abscond or become *non compos mentis*, or otherwise incapable or unsuitable to discharge the trust, such court may decree

their powers to cease. By the 38th section, it is provided "That when a *feme sole*, appointed executrix, administratrix, or guardian, shall marry, such marriage shall extinguish her right, under such appointment." By the 35th section it is provided "in all cases where the executor, administrator or guardian shall die, or where the probate court shall decree that their powers shall cease, or their right be by law extinguished, such court shall have power," &c. to grant power to others. This collation of the provisions of the statute, shows obviously that in relation to a number of causes of incompetency, the statute empowers the court to pass upon them, but the trust does not cease until the court so decree.

It is also apparent that it is contemplated vacancies may exist in three modes, to wit: 1. death—2, where the court decree the trust to cease, and 3, the right being by law extinguished. And it also appears that the marriage of a *feme sole* guardian is of the last class. Such marriage shall extinguish their right. Whether the trust and power shall survive on the death of a joint administrator, is a case on which the probate court is to decree. The statute seems clear and explicit, and safety and expediency would appear to sustain this view. By marriage, the wife passes under the control of the husband, and becomes incapable of keeping the effects of the ward separate from those of the husband. She has contracted a relationship of legal dependence, inconsistent with her trust, and for which her bail cannot be holden. She cannot even sue for the debts of her ward, without joining her husband, and then the judgment would survive to him. That a course so fruitful of incongruity is to arise or continue, because the probate court does not take official cognizance of a marriage of which it has no means of knowledge, is both against the express provision of the statute and common safety and security. The defendant's right and power as guardian, ceased upon her marriage in 1826. For the use and income after that time, the probate court could not compel account, and it therefore follows that the county court had jurisdiction of this cause. Here we might dispose of this question; but as the entire question has been argued, and the parties consider a full decision not only important to general practice, but to the ultimate decision of this case, the court proceed further.

Can this action be sustained for an account of those things which were done and received by the defendant within her powers of *guardian. The only guardian known *388 to the common law, who had the custody of estate, was that of guardian in socage. Guardians by nature, and for nurture, and in chivalry, only extended to the person. Against the guardian in socage, account could be sustained, declaring against him as guardian, and in that way only. It is now argued from this, that the action could be sustained against no other. This does not follow, for no other

was then known. It fully appears that if any person got into possession of the heir's lands, and used them as for him, and not in their own right, the action of account could be sustained against him as bailiff. Therefore, this action could have been sustained at common law. Perhaps it is in analogy with the ancient common law, sustaining account against the only guardian known to that law, that the courts in this country, considering the common law as having an elastic and expansive principle, adapting itself to the exigencies of society, have sustained this action against such guardians as are known to our laws. This analogy would be perfect if the declaration were against them as guardian, not bailiff. The defendant here seems to insist on abatement on the same matter on which a guardian in socage insists, when sued as bailiff, that is, that he is not sued in his right capacity; but goes further, and insists that no action in any form can be sustained in the common law courts. This seems to be insisting on the privilege of a guardian in socage, and yet disclaiming his liability.

Again, when a guardian in socage held beyond his ward's arrival at the age of 14 years, the action could be sustained against him as bailiff. This the defendant has done by holding beyond the termination of her guardianship, her marriage. But inasmuch as all persons, even intruders, who used the ward's estate for the ward, were subject to this suit as bailiff, and none could excuse themselves but guardian in socage, this defendant must be liable.

It is however insisted that when the guardianship is by appointment and not by descent, as in socage, there the action cannot be sustained. To sustain this doctrine, no decision is produced, not even in relation to testamentary guardians under the statute of Charles II., nor as to guardians and tutors appointed by the ecclesiastical courts in England, before that period; nor in relation to guardians in chancery. That such actions do not appear in the books against such guardians, may be ascribed to

two reasons: 1st, If such suits were brought, they would be against them as bailiffs, as already shown.—2d, Matters of trust *389 and account went *into chancery. This, however, did not repeal the action of account, and it has always been left on foot in this country. We are therefore not furnished with a single English decision that this action would not be there sustained, even for a guardianship by appointment.

Can it be sustained where the guardianship is not only by appointment, but appointment by a board having power to compel an account, and possessing an entire system? In Connecticut, where the probate court appoint the guardian, take bonds, and can compel an account, a system as entire as ours, it fully appears that after the termination of the guardianship, the action of account is sustained. So it also appears in Massachusetts. In New-York, where a surrogate may appoint a guardian, taking bond or the chancellor without, and where all is a perfect system of accounting in chancery, still it appears that at and after the termination of the guardianship, the ward may have an action of account at common law, and the court of chancery does not enjoin or interfere with it. This never extends to intermediate accounting.

However much we are inclined to confine parties to a single tribunal, and not to increase the already arduous duties of the county courts, and whatever might be our views of convenience, we feel constrained, from these principles and authorities, to hold that this action of account may be sustained, after a guardianship ceases, for what transpired under it.

It is not to be disguised, that the probate court is not clothed with all the power wanted for the accomplishment of the object of this action, the power of compelling an account and enforcing the collection of the balance found due, but more especially giving judgment for what accrued after the termination of the guardian's life.

Judgment reversed, and the defendant to answer over.

MINTER v. CLARK et al.

(22 S. W. 73, 92 Tenn. 459.)

Supreme Court of Tennessee. April 13, 1893.

Appeal and error from chancery court, Hardeman county; A. G. Hawkins, Chancellor.

Action by Arthur C. Minter against Thomas A. Clark, his guardian, and G. W. Doyle, W. W. Casselberry, J. M. Pettigrew, and W. W. Sommons, sureties on Clark's bond, to recover a balance due complainant on final settlement. There was a judgment in favor of plaintiff against Doyle and Casselberry, and a judgment in favor of Pettigrew and Sommons. From that part of the decree refusing a recovery against Pettigrew and Sommons, complainant appeals, and from that part allowing recovery against Casselberry he prosecutes a writ of error. Affirmed as to Doyle and Casselberry. Reversed as to Sommons and Pettigrew, and decree entered against them.

Wood & McNeal, for appellant. Frank Fentress, for appellee Clark.

CALDWELL, J. This is a suit for the settlement of a statutory guardianship. On the 8th of March, 1870, the county court of Hardeman county appointed defendant Thomas A. Clark guardian of complainant, Arthur C. Minter, a minor between two and three years old. Clark continued to act as guardian until Minter attained his majority, on the 2d day of July, 1888. In the mean time the guardian renewed his bond four times, and made several partial settlements. His original bond was signed by G. W. Doyle and H. W. Doyle as sureties. The first renewal bond was executed April 2, 1872, with L. S. Holmed and W. W. Casselberry as sureties; the second, May 6, 1873, with W. W. Casselberry and G. W. Doyle as sureties; the third, July 3, 1876, with J. M. Pettigrew and G. W. Doyle as sureties; the fourth December 1, 1879, with W. W. Sommons and G. W. Doyle as sureties. The last of the partial settlements was made on the 1st day of May, 1885. By that settlement, which is conceded to have been correct, a balance of \$936.07 was shown to be due from the guardian to the ward. Thereafter, at different times, the guardian made several small disbursements of money for and on account of his ward, leaving a large balance still due. September 21, 1891, Minter filed this bill against Clark, the guardian, and G. W. Doyle, Casselberry, Pettigrew, and Sommons, four of the sureties, alleging the foregoing facts, and the additional fact that Clark had refused to settle his accounts, and seeking a decree against the guardian and said sureties for such balance as the court might find to be due him. The defendants demurred to the bill, assigning as cause of demurrer that the action was barred by "the statutes of limitation." The

demurrer was overruled, with leave to rely

upon the same defense in answer. Clark thereafter died, and the bill was voluntarily dismissed as to him. Doyle and Casselberry suffered decrees pro confesso to be entered against them. Pettigrew and Sommons answered, and in their answer pleaded the statutes of limitation of three, of six, and of ten, years as complete bars to complainant's action. On final hearing decree was pronounced against Doyle and Casselberry for \$841, the amount found to be due from the guardian to the ward, but as to Pettigrew and Sommons the bill was dismissed, upon the ground that they were protected by the statutes of limitation interposed in their answer. From that part of the decree refusing a recovery against Pettigrew and Sommons, complainant appealed, and from that part allowing recovery against Casselberry he has prosecuted a writ of error.

The decree was right as to Doyle and Casselberry, but erroneous as to Pettigrew and Sommons. Complainant was entitled to a recovery against all of them. The suit was not barred as to any of them by any statute of limitations. Ordinarily a guardianship ceases only where the ward attains the full age of 21 years, if a male, or marries, if a female. Jones v. Ward, 10 Yerg. 168; State v. Parker, 8 Baxt. 497. There is nothing in this case to take it out of the general rule. Clark continued to be the guardian of Minter, and, as such, the proper custodian of his funds, until Minter attained his majority. No cause of action accrued to Minter until he was of age. Never before that time did he have the legal right to demand and receive his estate from Clark. It is true that Clark was derelict, in that he failed to make regular biennial settlements of his ward's estate, and to renew his bond every two years, as required by section 2499 of the Code; and it is also true that for such dereliction the county court was authorized to remove him from the guardianship, and appoint another in his place. Code, § 2500. But that neglect on his part and the existence of the authority in the county court cannot, of themselves and without more, be held to have denuded him of his office, and conferred upon his ward, while yet a minor, a right to sue for and recover his estate. A guardian cannot in that way cast off his official shoes, and put the statute of limitations in motion against his ward. To allow him to do so would be to give him the advantage of his own wrong. If the county court should remove an unfaithful guardian, and appoint another person in his room and stead, that would terminate the office of the former guardian, and give a cause of action against him for funds of the ward in his hands. The same is true where a guardian is permitted to resign, and another is appointed in his place. State v. Parker, 8 Baxt. 498. In the case before us there was abundant

cause for removal, and a tribunal with plenary power to remove and fill the vacancy; but that was all. No removal was made, sought, or attempted; hence the guardianship, with all of its legitimate consequences, continued until the majority of the ward, notwithstanding the nonfeasance of the guardian. Neither he nor his sureties will be heard to complain that he was not removed. The three-years limitation pleaded by Pettigrew and Sommons is found in section 2757 of the Code, which requires that a person to whom a cause of action accrues while under disability shall sue within three years after removal of that disability. Complainant's cause of action not having accrued while he was under disability, but at the time he attained his majority, that statute is not applicable in this case, and for that reason could not have barred his action. The statutes of six and ten years, (Code, §§ 2775, 2776,) also pleaded by those defend-

ants, are equally unavailing in this case, because neither ten nor six years elapsed, between the accrual of the action and the commencement of the suit. As we have already seen, this cause of action accrued at the time complainant became of age, and he filed this bill three years, two months, and nineteen days thereafter. The right of action as against the sureties did not accrue at the time they signed the bonds, nor two years thereafter, when the guardian failed to renew his bond as required by law; it did not accrue as to them in 1885, when he made his last partial settlement, nor at any time thereafter before the majority of complainant. The cause of action against the sureties is the same as that against the guardian; and it accrued against all of them at the same time. Enter decree against Pettigrew, Sommons, Doyle, and Casselberry for debt, interest, and costs.

BELL v. RUDOLPH et al.

(12 South. 153, 70 Miss. 234.)

Supreme Court of Mississippi. Dec. 5, 1892.

Appeal from chancery court, Hinds county; H. C. Conn, Chancellor.

Action by D. M. Rudolph and others against William Bell as surety for a guardian. From an order overruling his demurrer to the complaint, defendant appeals. Affirmed.

Calhoun & Green, for appellant. Frank Johnston, for appellees.

COOPER, J. The demurrer of the appellant was properly overruled. The obligation assumed by him in becoming surety for the guardian was that the estate of the infants should be lawfully managed by the guardian, and restored to them upon the determination of the guardianship. While this obligation was in force, the guardian, without authority of law, loaned the money of the wards to her husband, and it has never been repaid by him. Unless the estate is protected by the bond of the guardian it has been wasted, and cannot be restored to the infants, for Rudolph, the borrower, as well as the guardian, is insolvent. True, the appellant was upon his petition relieved from further liability for the acts of the guardian by the decree of the court having jurisdiction of the guardianship, by which a new bond was required, which was afterwards given. But this did not, and could not, relieve the sureties on the first bond from liability for past delinquencies of the guardian; as to those, they continue bound as before. The final account of the guardian and the

decree of the court thereon operated to conclusively establish the fact that the guardian was indebted to the wards in the sums for which decrees were made, and gave the right to execution against her for the same. But the decrees are not satisfaction of the demands of the wards; they are but steps in the process of securing satisfaction; and the objection of sureties is that they will pay the sums found due if the guardian does not. These decrees are conclusive against the guardian, and *prima facie* evidence against the sureties of the amount due by her to the wards. On the facts stated in the bill, and admitted by the demurrer, a large part of the sum now found to be due had been lost to the estate of the minors at and before the decree was made relieving the appellant from the bond. As to this he was then, and ever since has been, bound until the same should be returned to the guardian or to her successor in the guardianship. This obligation cannot be discharged by the mere admission of the guardian, nor by that, together with a decree that she should pay the same to the present guardian. Payment alone can discharge the obligation. The statutes of limitation set up by the demurrer are not available to the appellant. The defense rests upon the assumption that time began to run against the wards from the time the decree was passed discharging the appellant from liability for the future administration of the guardianship. This is an erroneous contention, for under the obligation of the bond the guardian was required to account with the wards, which she did not do until she rendered her final account. *Nunnery v. Day*, 64 Miss. 459, 1 South. Rep. 636.

MADISON COUNTY v. JOHNSTON et al.
(50 N. W. 492, 51 Iowa, 152.)

Supreme Court of Iowa. April 26, 1879.

Appeal from circuit court, Madison county. Action at law upon a guardian's bond. A judgment upon default was entered against the principal, the guardian. Upon an amended petition, charging that the surety had transferred his property without consideration, and praying that it be held subject to the payment of plaintiff's claim, the cause was transferred to the chancery docket. A trial upon the merits was had, and the petition as to the surety was dismissed.

McCaughan & Dabney, for appellant. Gilpin & Gilpin, for appellee.

BECK, C. J. 1. The money in the hands of the guardian, for which the surety is sought to be charged in this action, is the proceeds of real estate sold by the guardian upon proper proceedings and orders, as prescribed by the statute, had in the proper court. After the order for the sale, and before the lands were disposed of thereunder, the guardian executed, with a surety, a special bond, as prescribed by statute, that he should faithfully apply and account for the money realized from the sale of the property. The bond in suit was executed upon the appointment of the guardian. The sole question in the case which we find it necessary to determine is this: Is the surety upon the first bond executed by the guardian liable for the money received by the guardian upon the sale of the ward's lands? We must first direct our attention to the statute applicable to this case. The bond in suit was executed in 1863. The Revision of 1860 must therefore be consulted. Section 2548 is as follows: "Guardians appointed to take charge of the property of a minor must give bond, with surety to be approved by the court, in a penalty double the value of the personal estate, and of the rents and profits of the real estate of the minor, conditioned upon the faithful discharge of their duties as such guardians according to law. They must also take an oath of the same tenor as the condition of the bond." It is provided that lands or a minor might be sold by the guardian upon an order of the proper court, made in proceedings instituted for the purpose of bestowing authority therefor upon him. Sections 2552-2555. Section 2556 provides as follows: "Before any such sale or mortgage can be executed, the guardian must give security to the satisfaction of the court, the penalty of which shall be at least double the value of the property to be sold or the money raised by the mortgage, conditioned that he will faithfully perform his duty in that respect, and account for and apply all moneys received by him under the direction of the court." It will be observed that the bond given upon the qualification of the guardian is conditioned for the faithful discharge of his duty according to law, and the

penalty is the value of the personal estate and the rents and profits of the real estate of the minor. It is reasonable to suppose that the bond holds the surety responsible for the failure of the guardian to perform duties contemplated when the instrument was executed. The failure to discharge duties not contemplated by the law and by the parties cannot be the ground of recovery against the surety. This proposition, we think, cannot be doubted. It is plain to our minds that the proper disposition of the moneys to be afterwards received by the guardian upon the sale of real estate of the ward was not a duty contemplated by the statute requiring the execution of the bond, and could not, therefore, have been in the contemplation of the parties when the bond was executed. We base this conclusion upon the following grounds: (1) The bond, by the express language of the statute, (section 2548,) does not include in its penalty a sum to cover the money to be realized upon the sale of the minor's lands. Surely, if the statute intended that the surety should be held liable for money so acquired, provision would have been made for covering it by the penalty of the bond. (2) The guardian, when the bond was executed, was not charged with selling his ward's lands, and holding money realized therefrom. Such duty arose upon the order of the proper court, made in proceedings afterwards instituted. Sections 2552-2554. The guardian might or might not be charged with such duty, depending upon the property, circumstances, and interest of the ward, as determined by the court. It was not a contingent duty, even, when the bond was executed, for it could only occur upon the adjudication of the court. (3) When the guardian became charged with the duty of accounting for moneys realized by the sale of the ward's lands, he was required by the statute to enter into another bond, with a surety, conditioned for the faithful performance of such duty. The law would not surely require a bond to secure faithful performance of duty which was before secured. It cannot be claimed that the second bond is required to supply probable deficiency of security in the first. If the bond first given was regarded by the law, when it was executed, as sufficient to secure the faithful accounting for moneys realized upon the sale of lands, it continued to be sufficient. The foregoing views are, we think, sustained by the following authorities: *Lyman v. Conkey*, 1 Metc. (Mass.) 317; *Williams v. Morton*, 38 Me. 47; *Henderson v. Coover*, 4 Nev. 429; *Warwick v. State*, 5 Ind. 350; *State v. Steele*, 21 Ind. 207; *Potter v. State*, 23 Ind. 807; *Colburn v. State*, 47 Ind. 321; *In re Andrews' Heirs*, 3 Humph. 592.

2. The plaintiff insists that the surety is bound by the conditions of the bond in suit for the payment by the guardian of the money received for the land of the ward. The bond is conditioned that the guardian "shall faithfully discharge the office and trust of guardian, ac-

cording to law, and shall render a full and just account of said guardianship from time to time, whenever thereunto required by law, and render and pay to said minor all moneys, goods, and chattels, title papers and effects, which may come to the hands or possession of such guardian, belonging to such minor, when such minor shall be entitled thereto, or to any subsequent guardian should such court so direct." It will be understood that, while this bond specifies some duties to be performed by the guardian, it does not mention all; neither does it specify duties of the guardian not prescribed by the law. Each of the duties enu-

merated is included in those prescribed by the general language of the statute, namely, the faithful performance of the duties of guardian according to law. It may be that, if the bond contained conditions not covered by those prescribed by the statute, the defendant would be liable thereon, but as it does not, the instrument cannot be extended to matters not within the contemplation of the law. We reach the conclusion that the defendant is not liable upon the bond in suit. Other questions raised by counsel need not be considered in view of the conclusions we reach.

Affirmed.

WHITNEY et al. v. DUTCH et al.

(14 Mass. 457.)

Supreme Court of Massachusetts. Suffolk.
March Term, 1817.

Assumpsit on a promissory note, made by the defendants to the plaintiffs, on the 18th of December, 1811, for 847 dollars 76 cents.

The defendant Dutch was defaulted. The defendant Green pleaded 1st. The general issue: 2ly. That he was under age at the time when the note was made.—The plaintiffs replied, that after he came of age, he agreed to and confirmed the promise; to which he rejoined, that he did not so agree; on which also issue was joined.

It appeared at the trial, which was had at the last November term in this county before Jackson, J., that Dutch & Green, while the latter was under age, had agreed to be partners, and as such, had often dealt with the plaintiffs. The note in question was signed by Dutch, using the firm and style of the house of Dutch & Green, at a time when the latter was under age.

In March, 1816, after Green arrived at full age, the plaintiffs applied to him for payment of the note; when he acknowledged that it was due, and promised that on his return to Eastport, where he resided, he would endeavour to procure the money and send it to the plaintiffs: saying at the same time that it was hard for him to pay it twice; he alleging, as it was understood, that the supposed partnership had been, a long time before, dissolved; and that Dutch had taken the whole stock, and agreed to pay all the debts of the company.

The counsel for the defendant contended, that the implied power of one partner to bind the other, was void in this case; as Green was a minor at the time of making the note, and therefore could not empower any agent or attorney to bind him in any manner; that the note was therefore void as to him, and not merely voidable; and so the supposed promise could not be confirmed or ratified by the subsequent promise or agreement, which was proved, as above-mentioned.

The judge, intending to reserve the question for the consideration of the whole court, directed a verdict for the plaintiffs on both issues, which was returned accordingly.

If the court should be of opinion that the defendant Green was, under these circumstances, liable to the plaintiffs for the amount due on this note, the verdict was to stand, and judgment entered accordingly; otherwise the verdict was to be set aside, and a verdict entered for the defendants.

Mr. Thurston, for plaintiffs. Mr. Leland, for defendants.

PARKER, C. J. The question presented to the court in this case, and which has been argued is, whether the issue on the part of

the plaintiffs is maintained by the evidence reported.

The first objection taken by the defendants' counsel is, that no express promise is proved, after the coming of age of the defendant.—By the authorities, a mere acknowledgment of the debt, such as would take a case out of the statute of limitations, is not a ratification of a contract made during minority. The distinction is undoubtedly well taken. The reason is, that a mere acknowledgment avoids the presumption of payment, which is created by the statute of limitations; whereas the contract of an infant may always, except in certain cases sufficiently known, be voided by him by plea, whether he acknowledges the debt or not; and some positive act or declaration on his part, is necessary to defeat his power of avoiding it.

But the terms of ratification need not be such as to import a direct promise to pay. All that is necessary is, that he expressly agrees to ratify his contract; not by doubtful acts, such as payment of a part of the money due, or the interest; but by words, oral or in writing, which import a recognition and a confirmation of his promise.

In the present case, the defendant acknowledged that the money was due, when called upon to pay the demand; and promised that he would endeavour to procure the money upon his return home, and send it to the plaintiff. This was sufficient to satisfy the jury, that he assented to and ratified the original promise: for it would be a distortion of language, to suppose that he meant only to endeavour to persuade Dutch, to pay the money; and if he succeeded, that he, Green, would send it to the plaintiff.

But the other point made in the defence is more difficult, and presents a question new to us all. This is, that the note, being signed by Dutch for Green, was void in regard to Green; because he was not capable of communicating authority to Dutch, to contract for him; and that being void, it is not the subject of a subsequent ratification.

No such question appears to have occurred in our courts, nor in those of England, or of the neighbouring states. Partnerships have not been uncommon between adults and infants; and simple contracts, signed by one for both, undoubtedly have often been made.

It is unfavourable to the principle, contend for by the counsel for Green, that no such case has been found: for this silence of the books authorizes a presumption, that no distinction has been recognized between acts of this kind done by the infant himself, and those done for him by another. We must however examine the principles, by which the contracts of infants are governed; and see if, by any analogy to settled cases, the present defence can be maintained.

It is admitted generally, that a contract made by an infant, although not for necessaries, is only voidable; and that an ex-

adoption of it, after he comes of age, will make it valid from its date. Nor does the law require that he shall be sued, as upon the new promise; but gives life and validity to the old one, after it is thus assented to.—But it is urged, that this doctrine applies only to those contracts, which are made by the infant personally; and that the delegation of power by him to another of full age, to act for him, is utterly void; and that no contract, made in virtue of such delegation, can subsist, so as to be made good by subsequent agreement or ratification.

If we confine ourselves to the letter of the authorities, it would seem that this doctrine is correct; for we find that, in the distinctions made in the books between the void and voidable acts of an infant, a power of attorney is generally selected, by way of example, as an act absolutely void: unless it be made to enable the attorney to do some act for the benefit of the infant; such as a power of attorney to receive seizin, in order to complete his title to an estate.

The books are not very clear upon this subject. All of them admit a distinction between void and voidable acts; and yet disagree with respect to the acts to be classed under either of those heads. One result however, in which they all appear to agree, is stated by Lord Mansfield in the case of *Zouch v. Parsons*, 3 Burrows, 1794, viz. that whenever the act done may be for the benefit of the infant, it shall not be considered void: but that he shall have his election, when he comes of age, to affirm or avoid it; and this is the only clear and definite proposition, which can be extracted from the authorities.

The application of this principle is not however free from difficulty: for when a note or other simple contract is made by an infant himself, it may be made good by his assent, without any inquiry whether it was for his benefit, or to his prejudice. For if he had made a bad bargain in a purchase of goods, and given his promissory note for the price; and when he came of age, had agreed to pay the note, he would be bound by this agreement, although he might have been ruined by the purchase. Perhaps it may be assumed as a principle, that all simple contracts by infants, which are not founded on an illegal consideration, are strictly not void, but only voidable; and may be made good by ratification. They remain a legal substratum for a future assent, until avoided by the infant: and if, instead of avoiding, he confirm them, when he has a legal capacity to make a contract, they are, in all respects, like contracts made by adults.

With respect to contracts under seal also, they are in legal force as contracts, until they are avoided by plea. Whether they can, in all cases, as it is clear they can in some, such as leases, be ratified, so as to prevent the operation of a plea of infancy, except by deed, need not now be decided. A deed of

land, by an infant having the title, would undoubtedly convey a seizin; and the grantee would hold his title under it, until the infant, or some one under him, should by entry or action avoid it.

Perhaps it cannot be contended, against the current of authorities, that an act done by another for an infant, which act must necessarily be done by letter of attorney under seal, is not absolutely void: although no satisfactory reason can be assigned for such a position. But as this is a point of strict law, somewhat incongruous with the general rules affecting the contracts of infants; it is not necessary nor reasonable to draw inferences, which may be repugnant to the principles of justice, which ought to regulate contracts between man and man.

The object of the law, in disabling infants from blinding themselves, is to prevent them being imposed upon and injured by the crafty and designing. This object is in no degree frustrated by giving full operation to their contracts, if, after having revised them at mature age, they shall voluntarily and deliberately ratify and confirm them. It is enough, that they may shake off promises and other contracts, made upon valuable consideration; if they see fit to do it, when called upon to perform them. To give them still another opportunity to retract, after they have been induced, by love of justice, and a sense of reputation, to make valid what was before defective, will be to invite them to break their word and violate their engagements.

If it be true that all simple contracts, made by infants, are only voidable, the inquiry in this case should be, whether the facts stated furnish an exception to this general rule; or whether the contract now sued is in any sense different from a simple contract.

The only ground for the supposed exception is, that the note declared on was not signed by the infant himself; but by Dutch, claiming authority to sign his name as a co-partner. If the authority required a letter of attorney under seal, the exception would be supported by the authorities, which have been alluded to.

But it is well known that copartners may, and generally do undertake to bind each other, without any express authority whatever. Indeed the authority to do so, results from the nature and legal qualities of copartnership. And without any such union of interests, one man may have authority to bind another, by note or bill of exchange, by oral, or even by implied authority. The case of a deed therefore is entirely out of the question: so that the defendant does not bring himself within the letter of the authorities; and certainly not within the reason, on which they are founded. Then upon principle, what difference can there be, between the ratification of a contract made by the infant himself, and one made by another acting under a parole authority from him? And why may not the

ratification apply to the authority, as well as to the contract made under it?

It may be said, that minors may be exposed, if they may delegate power over their property or credit to another. But they will be as much exposed, by the power to make such contracts themselves; and more, for the person delegated will generally have more experience in business than the minor. And it is a sufficient security against the danger from both these sources, that infants cannot

be prejudiced: for the contracts are in neither case binding, unless, when arrived at legal competency, they voluntarily and deliberately give effect to the contract so made. And in such case justice requires, that they should be compelled to perform them.

Upon these principles, we are satisfied with the verdict of the jury; and are confident that no principles of law or justice are opposed by confirming it.

Judgment on the verdict.

BORDENTOWN TP. v. WALLACE et al.¹

(11 Atl. 267, 50 N. J. Law, 18.)

Supreme Court of New Jersey. Nov. 16, 1887.

On demurrer to defendants' pleas.

This action is brought on a joint and several bond given by the defendants to the plaintiff, in the penal sum of \$2,500, with the condition that, if the defendants "shall pay unto the said inhabitants of the township of Bordentown, or to its successors and assigns, the sum of two and a half dollars, each and every week, to the overseer of the poor for the time being of the said township of Bordentown, to be applied to and for the support of a certain female bastard child, of whom William Wallace, one of the parties hereby bound, is the father, for and during such period of time as the said bastard child shall or may be chargeable to the said township, then the said obligation is to be void, otherwise to be and remain in full force and virtue."

The declaration is in the usual form. After praying over, and setting out the bond, the defendants plead jointly six several pleas: (1) Non est factum. (2) Infancy of William Wallace. (3) Dureas of imprisonment of William Wallace. (4) Bond given before and without hearing of two justices, and when held before one justice of the peace until the bond was given. (5) Bond given to comply with order of filiation when no notice was given of such order. (6) That no order of filiation was made by two justices of the peace, according to law.

The plaintiff joins issue on the first plea, and files a demurrer to each of the five succeeding pleas.

Hutchinson & Belden, for plaintiffs. Gilbert & Atkinson, for defendants.

SCUDDER, J. The defense of the infancy of one of the defendants contained in the joint plea of all is informal and bad. Infancy is a personal privilege of which no one can take advantage but himself. Voorhees v. Wait, 15 N. J. Law, 343; Patterson v. Lippincott, 47 N. J. Law, 457, 1 Atl. 506.

It is also a rule of pleading that personal defenses, as coverture, infancy, etc., shall be pleaded separately; that only when the defense is in its nature joint may several defendants join in the same plea; and that where a plea is bad in part, it is bad in toto; if, therefore, two or more defendants join in a plea which is sufficient but for one, and not for the other, the plea is bad as to both. 1 Chit. Pl. 565-567. But it must not be conceded that in a proper case, under our statute for the maintenance of bastard children, the father of a bastard child can escape his obli-

gation, or liability to indemnify the township or municipal body, for the support of such child, if it become chargeable, by a plea of infancy, however formally it may be pleaded. Co. Litt. 172d, gives the rule of an infant's general liability as follows: "An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards; but if he bind himself in an obligation or other writing with a penalty, for the payment of any of these, that obligation shall not bind him." He adds: "And generally whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit at law." Lord Mansfield quotes and applies this last expression in Zouch v. Parsons, 3 Burrows, 1794, and adds: "If an infant does a right act, which he ought to do, which he was compellable to do, it shall bind him." This general principle has been used in bastardy cases to bind infants, under statutes passed to protect the public against the support of bastard children that may become chargeable. People v. Moores, 4 Denio, 518; McCall v. Parker, 13 Metc. (Mass.) 372. In this latter case, in an action on a bond given under the statute, for appearance, etc., it was decided that the infancy of the accused is no defense, either for him or his surety. Prof. Parsons, in 1 Par. Cont. 334, says that there is no principle of law that binds infants when they enter into contracts which owe their validity, and the means of their enforcement, to statutes, because in all statutes containing general words there is an implied or virtual exception in favor of persons whose liability the common law recognizes. He proceeds to illustrate this position by referring to cases where infants have been held exempt from liability to pay calls to shares in incorporated companies, wherein it has been held that there are implied exceptions, in favor of infants, in statutes containing general words. But the words in our bastardy statute requiring the reputed father of a bastard child, who may in some cases be an infant, to give a bond for security, are not so general as to exempt infants from its operation. They are fairly within the words of the act, and its purpose to protect the public against those who would impose the support of their illegitimate offspring on others. Tyler on Infancy, c. 9, p. 139, cites the above principle of liability in its application to bastardy cases with approval.

This second plea is defective in form, being a joint plea of the infancy of one defendant; it is also bad in substance, as in proceedings under the bastardy act the infancy of the reputed father is no defense when he is legally chargeable in exoneration of the public.

¹ Irrelevant parts omitted.



McKANNA et al. v. MERRY.

(61 Ill. 177.)

Supreme Court of Illinois. Sept. Term, 1871.

Appeal from circuit court, Jo Daviess county; William Brown, Judge.

Louis Shissler, for appellants. Sheean & Weigley, for appellee.

THORNTON, J. In 1864, Kate Feehan, since intermarried with McKanna, accompanied appellee and wife on a trip from Illinois to California, by water. Her passage money was paid by appellee. Kate was then an infant, and under the control of her guardian, who was desirous that she should attend school for another year, and disapproved of the trip.

The only proof as to the value of her estate is that it consisted of an undivided one-third of some realty, which, after her marriage, and a few years after the advancement of the money, was sold for \$3250.

There is no proof that this trip was necessary for her health, or that it subserved any purpose other than pleasure, or as company for the wife of appellee.

The court gave for appellee the following instruction:

"What are necessaries depends upon the circumstances of the case. If the going of defendant, Kate, to California was prudent and proper, under the circumstances proved, and the plaintiff advanced money necessary to take her there, and the same was for her benefit, then it is for the jury to determine whether such advances of money were for necessities."

There is no positive rule by means of which it may be determined what are and what are not necessities. Whether articles are of a class or kind for which infants are liable, or whether certain subjects of expenditure are necessities, are to be judged of by the court. Whether they come within the particular class, and are suitable to the condition and estate of the infant, is to be determined by the jury as matter of fact. For example, suppose this trip had been to Europe, involving, in time, several years, and an expenditure of thousands of dollars, would any court hesitate to decide that the money thus advanced did not constitute necessities? Chit. Cont. 141a, note 2; 1 Pals. Cont. 298; Beeler v. Young, 1 Bibb, 519; 1 Am. Lead. Cas. 248.

The court, in the instruction, merely informed the jury that if the trip was prudent and proper, and that the money was for her benefit, then the jury must determine whether such advances of money were for necessities. There was not a particle of proof to enable the jury to determine as to the propriety or impropriety, the prudence or imprudence, of the trip, or that the advancement of the money was for the benefit of appellant.

Even if there had been such proof, the instruction was wrong. The court should have defined necessities in some manner. Blackstone defines necessities to be "necessary meat, drink, apparel, physic," and says that an infant may bind himself to pay "for his good teaching and instruction, whereby he may profit himself afterwards." The articles furnished, or money advanced, must be actually necessary, in the particular case, for use, not mere ornament; for substantial good, not mere pleasure; and must belong to the class which the law generally pronounces necessary for infants.

The courts have generally excluded from the term "necessaries" horses, saddles, bridles, pistols, liquors, fiddles, chronometers, etc. It has been held, however, that if riding on horseback was necessary to the health of the infant, the rule was different.

We have been referred to no case, and, after a thorough examination, have found none, in which it has been held that monies advanced for traveling expenses, under the circumstances of this case, were necessities.

The court should have instructed the jury as to the classes and general description of articles for which an infant is bound to pay. Then the jury must determine whether they fall within any of the classes, and whether they are actually necessary and suitable to the estate and condition of the infant.

It may be proper to advert to another principle. The infant had a guardian, who had charge and management of her estate, which consisted entirely of realty. It was the duty of the guardian to superintend the education and nurture of his ward, and apply to such purpose, first, the rents and profits of the estate, and next the interest upon the ward's money. This is the positive command of the statute, and he was liable upon his bond for noncompliance. He was the judge of what were necessities for his ward, if he acted in good faith.

A third party had no right to intervene and usurp the rights and duties of the guardian. Even if the money paid was, in some sense, for the infant's benefit, and the trip was prudent and proper, yet, if the guardian, in good faith, and in the exercise of a wise discretion, and with reference to the best interests of his ward, supplied her wants and contributed means suitable to her age and station in life, and in view of her estate, then the infant would not be liable for the money as necessities. Beeler v. Young, supra; Kline v. L'Amoureux, 2 Paige, 419; Guthrie v. Murphy, 4 Watts, 80; Wailing v. Tall, 9 Johns. 141.

We express no opinion as to the weight of the evidence, for the reason that there must be a new trial.

The judgment is reversed for the errors indicated, and the cause remanded.

Judgment reversed.

STAFFORD v. ROOF.

(9 Cow. 626.)

Court of Errors of New York. Dec., 1827.

On error from the supreme court. 7 Cow. 179. John Stafford brought trover for a horse against Roof, in the C. P. of the city of Albany, called the mayor's court; and the cause was tried there in October, 1824. On the trial, the plaintiff below proved that in July, 1824, he owned the horse, and on the 23d of that month sold it to the defendant below; and took his note in these words: "For value received, I promise to pay John Stafford fifty dollars in liquor at my bar." On this note the following payments were endorsed by the plaintiff below: July 26th, 1824, \$4. Same day, \$1 25. July 30th, cash, \$5 50. August 4th, cash, \$18 00. August 7th, \$12 34. The defendant below also proved, that at the time of the purchase of the horse, the plaintiff below owed the defendant below between thirty and forty dollars for board, lodging, carriage-hire, and liquor. The plaintiff below proved that some time after the sale of the horse, the defendant below offered the horse for sale as his own property, to one John Griffith, who declined to purchase; and farther, that the plaintiff below was but 19 years of age at the time of the sale of the horse; that Spencer Stafford was his general guardian.

The defendant below moved for a nonsuit, on the ground that no conversion had been proved; and also on the ground that it was not competent for the plaintiff below to avoid his contract while yet under age. The motion was overruled; and the defendant below excepted.

The defendant below then proved a receipt given by the plaintiff below, dated August 27th, 1824, during the pendency of the suit, in full of the note; and that the plaintiff below had disavowed the suit.

The court below charged that the plaintiff below had a right to bring his action while yet an infant; that the contract was void; that the defendant below was not entitled to have any of the payments made by him allowed, except such as were in necessaries; and that the plaintiff was entitled to recover. The defendant below excepted. Verdict for the plaintiff below of \$55, upon which the mayor's court gave judgment. The defendant below brought error to the supreme court, who reversed the judgment on the sole ground that an infant cannot avoid his executed contract during his minority. Upon which the defendant below brought error to this court.

The reasons for the judgment of the supreme court were now assigned, as in 7 Cow. 180-185.

Jacob Lansing, for plaintiff in error. A. Taber, contra.

JONES, Ch., said, It is true in general that the deed of an infant is voidable merely,

when delivered with his own hand, and is of equal validity, whether it be of lands or chattels. Some of the old writers seem to make a distinction between deeds and other contracts of infants accompanied by manual delivery; but the distinction is now discarded, and the same effect is given to both. They are not void, but voidable, where any act of delivery is done by the infant calculated to carry an estate; and this whether the contract be beneficial to the infant or not. But a manual delivery seems in such case to be essential. None was shown in this case. The fact of possession by the vendee would be evidence of delivery in the case of an adult; but in case of an infant vendor, there should be strict proof of a personal delivery. An infant cannot make an attorney. The appointment would be void; and there being no proof of actual manual delivery, the contract would seem to be void. The agreement to sell conferred no right upon the vendee to take. The mere agreement of the infant to sell would not protect the vendee against an action of trespass for taking the horse. The taking would be tortious; and in itself a conversion.

But suppose the sale to be merely voidable; could the infant or his guardian avoid it before he arrived at 21 years of age? The general rule is, that an infant cannot avoid his contract executed by himself, and which is therefore voidable only while he is within age. Bool v. Mix, 17 Wend. 119; Slocum v. Hooker, 13 Barb. 538. He lacks legal discretion to do the act of avoidance. But this rule must be taken with the distinction that the delay shall not work unavoidable prejudice to the infant; or the object of his privilege, which is intended for his protection, would not be answered. When applied to a sale of his property, it must be his land; a case in which he may enter and receive the profits until the power of finally avoiding shall arrive; and such was the doctrine of Zouch v. Parsons, 8 Burrows, 1794. Should the law extend the same doctrine to sales of his personal estate, it would evidently expose him to great loss in many cases; and we shall act up to the principle of protection much more effectually by allowing him to rescind while under age, though he may sometimes misjudge, and avoid a contract which is for his own benefit. The true rule, then, appears to me to be this; that where the infant can enter, and hold the subject of the sale till his legal age, he shall be incapable of avoiding till that time; but where the possession is changed, and there is no legal means to regain and hold it in the mean time, the infant, or his guardian for him, has the right to exercise the power of rescission immediately. Now the common law gives no action or other means by which the mere possession of personal property can be reclaimed, and held subject to the right of avoidance.

Besides, in this case the infant had a gen-

eral guardian. It may well be doubted whether he could make any contract of sale which should bind him, for any purpose, during his wardship.

STEBBINS, Senator. Whatever may be the correct opinion (and I am not prepared to express any) upon the question discussed by the supreme court in this cause, and in the opinion of his honor the chancellor, as to the right of an infant to avoid, during his minority, a sale of property made by him, there is another point upon which I must place my vote.

The plaintiff brought his action of trover against the defendant in the mayor's court, for the horse which he had sold him during his infancy, and recovered. The defendant took a bill of exceptions upon the ground, among others, that no conversion was proved.

The cause coming before the supreme court upon this bill of exceptions, the judgment is reversed, for the reason that the plaintiff, being an infant, could not legally avoid his contract of sale, until he should become of age. This court is possessed of the cause upon a writ of error brought to reverse the judgment of the supreme court, and to restore to the plaintiff his judgment obtained in the mayor's court.

It is obvious, therefore, that if no conversion of the horse was proved in the mayor's court, the judgment of that court ought to have been reversed by the supreme court, for that reason as well as for the reason assigned by them; and if the exception was well taken by the defendant, the judgment of the supreme court ought now to be affirmed.

The only evidence of conversion is, that the defendant upon one occasion, offered to sell the horse; and this, in my judgment, does not amount to a conversion. There is no evidence of any tortious taking, or demand and refusal.

The defendant came into possession as a purchaser. The sale was not void, but voidable by the infant; and conceding, therefore, that he may avoid it before coming of age, it is certainly good until avoided; and the possession of the defendant must have been

rightful until such avoidance. His offer to sell, then, can be no conversion.

The first evidence, or notice of his election to avoid the contract which the plaintiff seems to have given, was the commencement of this suit. I think he should first have given notice of his election to avoid the contract, and demanded the horse, and waited for a refusal to deliver, as evidence of conversion, before he commenced his prosecution; and for this reason I am in favor of affirming the judgment of the supreme court.

JONES, Ch., said his attention had been mainly employed upon the question discussed by the supreme court. He had attended but slightly to that branch of the case examined by the honorable senator; nor did he feel prepared to express himself strongly upon the question whether an offer to sell a chattel by one who comes lawfully into the possession of it, shall be helden a conversion. He inclined to think that it was an act of such control, inconsistent with, and in defiance of the rights of the true owner, as to be, *prima facie*, evidence of a conversion.

But here is a sale set up as having been made by an infant under the care of a general guardian, and accompanied with no evidence whatever of a manual delivery by the ward. He had remarked that such a delivery cannot be intended, though it would be otherwise in the case of an adult. It then stands before us, at best, as the case of an infant contracting to sell; and the vendee taking possession in virtue of the contract, without its being followed up by any act of delivery. Such a taking would be tortious, and a conversion in itself.

He was of opinion, on the whole case, that the judgment of the supreme court should be reversed.

For reversal: THE CHANCELLOR, ALLEN, CRARY, ELSWORTH, ENOS, GARDINER, HAIGHT, HART, JORDAN, LAKE, McMARTIN, WATERMAN, and WILKESON, Senators.

For affirmation: BURROWS, DAYAN, McCALL, NELSON, OLIVER, SMITH, and STEBBINS, Senators.

Judgment reversed.

**GOODNOW et al. v. EMPIRE LUMBER CO.
et al.**

(18 N. W. 283, 81 Minn. 468.)

Supreme Court of Minnesota. Jan. 28, 1884.

Appeal from an order of the district court, Winona county.

W. H. Yale and J. M. Gilman, for respondents, Mary Hamilton Goodnow and another. Thomas Wilson, for appellants, the Empire Lumber Co. and another.

GILFILLAN, C. J. November 27, 1857, Elizabeth M. Hamilton, then a married woman and owner of certain real estate in the city of Winona, conveyed the same, her husband joining in the deed, to the defendant Huff, under whom the other defendant claims. Mrs. Hamilton was born April 21, 1842. She died December 16, 1867, and her husband died November 10, 1874. Plaintiffs are their children, Mary, born March 31, 1859, and Eugenia, January 29, 1863. They bring the action to avoid the conveyance, because of the minority of Elizabeth M. Hamilton when she executed it. Plaintiffs gave notice to the lumber company of their intent to disaffirm the conveyance, March 22, 1883. Treating this as a sufficient act of disaffirmance in case they then had the right to disaffirm, and it is not material whether it was or not, for the bringing of the action, which was sufficient, immediately followed, there elapsed between the execution of the deed and its disaffirmance twenty-five years and four months. The disability of infancy on the part of the infant grantor ceased April 21, 1863, and as the real estate was owned by her at the time of her marriage, her disability from coverture, so far as affected her right to reclaim, hold and control the property ceased August 1, 1866, when the General Statutes (1866) went into effect; so that for four years and eight months before she died she was free of the disability of infancy, and for one year four and a half months, she was practically free of the disability of coverture. During the latter period, at least, she was capable in law to disaffirm the deed, if she had the right to do so, and if she was required to exercise the right within a reasonable time after her disability ceased, the time was running for that period. The youngest of the plaintiffs became of age January 29, 1881, so that even if the period of minority of plaintiffs were to be excluded (and we doubt if it should be) there is to be added at least two years and two months to the time which had elapsed when the grantor died, making the time three years and over six months.

The main question in the case is, must one who, while a minor, has conveyed real estate, disaffirm the conveyance within a reasonable time after minority ceases, or be barred. Of the decided cases the majority are to the effect that he need not, (where there are no instances other than lapse of time and

silence,) and that he is not barred by mere acquiescence for a shorter period than that prescribed in the statute of limitations. The following are the principal cases so decided: Vaughan v. Parr, 20 Ark. 600; Boody v. McKenney, 23 Me. 517; Davis v. Dudley, 70 Me. 236; Praut v. Willey, 28 Mich. 164; Gause v. Norcum, 12 Mo. 550; Norcum v. Gaty, 19 Mo. 69; Peterson v. Laik, 24 Md. 541; Baker v. Kennett, 54 Mo. 82; Huth v. Dock Co., 56 Md. 206; Hale v. Gerriah, 8 N. H. 374; Jackson v. Carpenter, 11 Johns. 538; Voorhies v. Voorhies, 24 Barb. 150; McMurray v. McMurray, 66 N. Y. 175; Lessee of Drake v. Ramsey, 5 Ohio, 252; Creasinger v. Lessee of Welsh, 15 Ohio, 156; Irvine v. Irvine, 9 Wall. 617; Ordinary v. Wherry, 1 Bailey, 28.

On the other hand, there are many decisions to the effect that mere acquiescence beyond a reasonable time after the minority ceases bars the right to disaffirm, of which cases the following are the principal ones: Holmes v. Blogg, 8 Taunt 35; Railway Co. v. Black, 8 Exch. 180; Thomasson v. Boyd, 13 Ala. 419; Delano v. Blake, 11 Wend. 85; Bostwick v. Atkins, 8 N. Y. 53; Chapin v. Shafer, 49 N. Y. 407; Jones v. Butler, 30 Barb. 641; Kline v. Beebe, 6 Conn. 494; Wallace's Lessee v. Lewis, 4 Har. 80; Hastings v. Dollarhide, 24 Cal. 185; Scott v. Buchanan, 11 Humph. 487; Hartman v. Kendall, 4 Ind. 403; Bigelow v. Kinney, 3 Vt. 353; Richardson v. Bright, 9 Vt. 388; Harris v. Cannon, 6 Ga. 382; Cole v. Pennoyer, 14 Ill. 158; Black v. Hills, 38 Ill. 376; Robinson v. Weeks, 56 Me. 102; Little v. Duncan, 9 Rich. Law, 55.

The rule holding certain contracts of an infant voidable (among them his conveyances of real estate) and giving him the right to affirm or disaffirm after he arrives at majority, is for the protection of minors, and so that they shall not be prejudiced by acts done or obligations incurred at a time when they are not capable of determining what is for their interest to do. For this purpose of protection the law gives them an opportunity, after they have become capable of judging for themselves, to determine whether such acts or obligations are beneficial or prejudicial to them, and whether they will abide by or avoid them. If the right to affirm or disaffirm extends beyond an adequate opportunity to so determine and to act on the result, it ceases to be a measure of protection, and becomes, in the language of the court in Wallace's Lessee v. Lewis, "a dangerous weapon of offense, and not a defense." For we cannot assent to the reason given in Boody v. McKenney (the only reason given by any of the cases for the rule that long acquiescence is no proof of ratification) "that by his silent acquiescence he occasions no injury to other persons and secures no benefits or new rights to himself. There is nothing to urge him as a duty to others to act speedily."

The existence of such an infirmity in one's title as the right of another at his pleasure to defeat it, is necessarily prejudicial to it, and

the longer it may continue the more serious the injury. Such a right is a continual menace to the title. Holding such a menace over the title is of course an injury to the owner of it; one possessing such a right is bound in justice and fairness towards the owner of the title to determine without delay whether he will exercise it. The right of a minor to disaffirm on coming of age, like the right to disaffirm in any other case, should be exercised with some regard to the rights of others,—with as much regard to those rights as is fairly consistent with due protection to the interests of the minor.

In every other case of a right to disaffirm, the party holding it is required, out of regard to the rights of those who may be affected by its exercise, to act upon it within a reasonable time. There is no reason for allowing greater latitude where the right exists because of infancy at the time of making the contract. A reasonable time after majority within which to act is all that is essential to the infant's protection. That 10, 15, or 20 years, or such other time as the law may give for bringing an action, is necessary as a matter

of protection to him is absurd. The only effect of giving more than a reasonable time is to enable the mature man, not to correct what he did amiss in his infancy, but to speculate on the events of the future—a consequence entirely foreign to the purpose of the rule which is solely protection to the infant. Reason, justice to others, public policy, (which is not subserved by cherishing defective titles,) and convenience, require the right of disaffirmance to be acted upon within a reasonable time. What is a reasonable time will depend on the circumstances of each particular case, and may be either for the court or for the jury to determine. Where, as in this case, there is mere delay, with nothing to explain or excuse it, or show its necessity, it will be for the court. *Cochran v. Toher*, 14 Minn. 885 (GIL. 293); *Derosin v. Railroad Co.*, 18 Minn. 133 (GIL. 119). Three years and a half, the delay in this case, (excluding the period of plaintiff's minority, after the time within which to act had commenced to run,) was *prima facie* more than a reasonable time, and *prima facie* the conveyance was ratified. Order reversed.

LEMMON v. BEEMAN.

(15 N. H. 476, 45 Ohio St. 505.)

Supreme Court of Ohio. Jan. 10, 1888.

Error to district court, Sandusky county.

William J. Beeman, the plaintiff below, sued the defendant, James F. Lemmon, as administrator, for money paid by him upon the purchase of a certain stock of drugs of James Lemmon, the defendant's decedent, the plaintiff being a minor at the time of the purchase, and having elected, on becoming of age, to rescind the contract. On the trial of the case, in the common pleas, the defendant excepted to a part of the charge of the court, and took a bill of exceptions, setting forth the evidence and the charge; to which exception was taken. The judgment was for the plaintiff, and was affirmed in the district court. The part of the charge to which exception was taken is to the effect that, upon the facts of the case, the plaintiff could recover without returning the property. The facts are stated in the opinion.

M. B. Lemmon and J. M. Lemmon, for plaintiff in error. J. H. Rhodes, for defendant in error.

MINSHALL, J. (after stating the facts as above.) In 1881, Beeman, then a minor, purchased of James Lemmon, then in life, but since deceased, a certain stock of drugs, for which he paid at the time \$400, the price as agreed on between them. The stock was in a store in the state of Illinois; and the sale was made by Lemmon, through his agent, Dr. Everett, who some time before had sold the stock to Lemmon, and, as his agent, had continued in possession of the property, and conducted the business for him. In a short time after the sale had been made to Beeman, the goods were taken from him under an execution issued upon a judgment against Everett, upon the claim of the creditor of the latter that they belonged to him, and not to Lemmon. Beeman made an effort to recover the property; and, in a short time after he became of age, (which was in 1882,) disaffirmed the contract, presented a claim to the administrator of Lemmon's estate for the money he had paid on the purchase, and demanded its return; which was refused and the claim rejected.

No point is made as to the ownership of the goods; it is averred in the petition, and must be taken as the fact, that they belonged to the deceased at the time of the sale to Beeman. Again, there is no room for a claim, nor is it made, that the property purchased was in the nature of necessaries, and the contract, for such reason, incapable of being disaffirmed; nor is it claimed that the decedent or his agent was in any way deceived as to the age of Beeman at the time the sale was made. The only question presented upon the record is whether, upon the facts as stated, the minor had the right, on becoming of age,

to rescind the contract, and recover the consideration he had paid, without returning the property that had been sold and delivered to him. The true doctrine now seems to be that the contract of an infant is in no case absolutely void. 1 Pars. Cont. 295, 328; Pol. Cont. 36; Harner v. Dipple, 31 Ohio St. 72; Williams v. Moor, 11 Mees. & W. 256. An infant may, as a general rule, disaffirm any contract into which he has entered; but, until he does so, the contract may be said to subsist, capable of being made absolute by affirmation, or void by disaffirmance, on his arriving at age; in other words, infancy confers a privilege rather than imposes a disability. Hence the disaffirmance of a contract by an infant, in the exercise of a right similar to that of rescission in the case of an adult, the ground being minority, independent of questions of fraud or mistake. But, in all else, the general doctrine of rescission is departed from no further than is necessary to preserve the grounds upon which the privilege is allowed; and is governed by the maxim that infancy is a shield, and not a sword. He is not in all cases, as is an adult, required to restore the opposite party to his former condition; for if he has lost or squandered the property received by him in the transaction that he rescinds, and so is unable to restore it, he may still disaffirm the contract and recover back the consideration paid by him without making restitution; for, if it were otherwise, his privilege would be of little avail as shield against the inexperience and improvidence of youth. But when the property rescinded by him from the adult is in his possession, or under his control, to permit him to rescind, without returning it, or offering to do so, would be to permit him to use his privilege as a sword, rather than as a shield. This view is supported, not only by reason, but by the greater weight of authority. It was recognized and applied by this court in Cresinger v. Welch, 15 Ohio, 156, decided in 1846. The following is the language used by Mr. Tyler on the subject: "If the contract has been executed by the adult, and the infant has the property or consideration received at the time he attains full age, and he then repudiates the transaction, he must return such property or consideration, or its equivalent, to the adult party. If, however, the infant has wasted or squandered the property or consideration received during infancy, and on coming of age repudiates the transaction, the adult party is remediless." He then adds that "there are expressions of judges and text writers against this latter proposition, but," he says, "the weight of authority is in harmony with it, and is decidedly in accord with the general principles of law for the protection of infants." Tyler, Inf. (2d Ed.) 80, and cases cited by the author. See, also, the case of Price v. Furman, 27 Vt. 268, and the notes thereto of Mr. Ewell, in his Leading Cases on Infancy & Coverture, 119. After an exhaustive review of the cases, this author says: "The

true doctrine, and the one supported by the weight of authority, (at least in the United States,) would seem to be that when an infant disaffirms his executed contract, after arriving at age, and seeks a recovery of the consideration moving from him, and where the specific consideration received by him remains in his hands, in specie at the time of disaffirmance, and is capable of return, it must be returned by him; but if he has, during infancy, wasted, sold, or otherwise disposed of, or ceased to possess the consideration, and has none of it in his hands in kind on arriving at majority, he is not liable therefor, and may disaffirm without tendering or accounting for such consideration." This statement of the law, supported, as it is, not only by the greater weight of authority, but also of reason, meets with our full approval. There is, however, much conflict in the decisions of the different states; greater perhaps than upon any other question connected with the law of infancy, (Metc. Cont. 76;) but we deem it unnecessary to attempt to review or discuss them, for the very good reason, that it has been done with thoroughness and ability by the authors just referred to. See, also, the notes of Mr. Ewell to the recent case of Adams v. Beall, decided by the Maryland court of appeals, 26 Am. Law Reg. 710 (8 Atl. 664).

We have been cited, by counsel for the defendant below, to a number of the previous decisions of this court, supposed to affect the right of the plaintiff to recover; but a careful examination will disclose that such is not the case. In Starr v. Wright, 20 Ohio St. 97, a conveyance had been made by a father to his minor son, it being without any consideration and intended to defraud creditors; and, during minority, the son had reconveyed to the father to enable him to raise money and pay his creditors, who, for a full consideration, then conveyed to the defendant. The court denied the right of the son on arriving at age to disaffirm his deed of reconveyance. Being the voluntary grantee of his father, the son had done no more than was his moral duty to do; and what he might have been compelled to do in favor of creditors and purchasers. The court applied the maxim, that infancy is a shield and not a sword. The case is quite analogous in principle to the leading one of Zouch v. Parsons, decided by Lord Mansfield, in 1765. It was there held that where an infant does what he might have been compelled by a court of equity to do, he cannot afterwards disaffirm his act. 3

Burrows, 1794. In Harner v. Dipple, 31 Ohio St. 72, the question was whether an undertaking executed by an infant for stay of execution was void, or only voidable. The court held that it was voidable only, and might therefore be, as it had been, affirmed by the infant on arriving at age. In Curtiss v. McDougal, 26 Ohio St. 67, it appears an infant has purchased a team of mules, and at the same time had executed a mortgage on them to secure the purchase money. He afterwards sold the property to his father, who brought an action in replevin against an assignee of the mortgage to recover possession. The claim was based on the theory that, by the subsequent sale of the mortgaged property, the infant had disaffirmed the mortgage, as he would have had a right to do so. It is difficult to see how the sale of the property purchased could be treated as a disaffirmance of the contract by which he had acquired it; it was rather an affirmation than a disaffirmance of that contract, and entirely consistent with the existence of the mortgage that he had given to secure the payment of the purchase money. Again, there was no positive disaffirmance by the infant, the claim being made by a third person, his grantee, although the rule is well settled that the privilege is personal to the infant, and is not available to third persons. 1 Para. Cont. 329. But the court placed its decision upon the broader ground that it was not within the privilege of the infant to disaffirm the security he had given for the purchase money without also avoiding the purchase, saying that "in such case, if the infant would rescind a part, he must rescind the whole contract, and thereby restore to the vendor the title acquired by the purchase;" again applying the principle that infancy may be used as a shield, but not as a sword. So that the claim of the plaintiff in replevin defeated his right to recover, as a disaffirmance of the mortgage would necessarily have divested the title by which he claimed the property. It is apparent that none of these cases, when rightly considered, affect the right of the plaintiff to disaffirm the purchase made of the decedent, and to recover the consideration paid. Neither he, nor any one claiming under him, makes any claim to the property purchased. By his disaffirmance, the title has been restored to the estate of the vendor, and the property, or its value, may be recovered by the administrator, if it was wrongfully taken by the sheriff under the execution against Everett. Judgment affirmed.

HUMPHREY v. DOUGLASS.

(10 Vt. 71.)

Supreme Court of Vermont. Chittenden. Jan.,
1838.

Exceptions from Chittenden county court.

This was an action of trespass on the case. The plaintiff declared in three counts. In the two first counts, he alleged, that he was on the first day of May, 1836, possessed of two horses, which escaped from his enclosure, and went into the enclosure of one Richard Douglass, senior, the father of the defendant, and that the defendant, without notifying the plaintiff, turned said horses into the highway; that the said horses were never afterwards found, and were wholly lost to the plaintiff. The third count was trover, for converting the horses to defendant's use. Plea—Not guilty. Issue to the country. On the trial of the cause in the County Court, the plaintiff offered evidence tending to prove, that in May or June, 1836, he owned two horses, and on Saturday in the afternoon, put them into his own pasture, adjoining the meadow of Richard Douglass, senior, the father of the defendant; that on Sunday morning the horses were in said meadow, trespassing; that the defendant, who was then about fifteen years old, and lived with his father, drove said horses from said meadow, by the command of his father, into the public highway, whence they strayed away, and had never been heard of afterwards; that the plaintiff had been put to trouble in hunting after the horses, and, by reason of being deprived of them, had sustained considerable damage, for the want of a team to do his spring and summer work with. Upon this evidence, the defendant requested the Court to charge the Jury; that, at law, no action could be sustained against the defendant; that the act of the defendant, (being a minor and the servant of his father) in turning the horses into the highway, by the command of his father, was not a trespass, inasmuch as the horses were trespassing on his father's land. The Court refused so to charge the jury, but instructed them, that if they believed that the horses went from the plaintiff's lot into the meadow of Richard Douglass, *sen., and were turned from

said meadow into the highway, by the defendant, and were consequently lost, they must find for the plaintiff the value of the horses, and interest thereon, and that they

were at liberty to give such further damages as the plaintiff had sustained, by being deprived of a team to do his work with, and for time spent, and expenses incurred, in procuring one. The Jury returned a verdict for the plaintiff, and the defendant excepted to the charge of the County Court.

Wm. P. Briggs, for plaintiff. J. Maeck and F. G. Hill, for defendant.

WILLIAMS, C. J. The defendant, in this case, was acting by the consent of his father, and although a minor, yet, if he has occasioned an injury to the plaintiff, he must be answerable therefor. An infant, acting under the command of his father, as a wife in the presence of her husband, might be excused from a prosecution for a crime, if it should appear that the intent was wanting,

or that he was acting under constraint; yet, he is answerable for injuries he does to another. The person, who has sustained an injury, looks for redress to the person committing it, and he is not bound to inquire whether another has caused the injury, against whom he might also have an action. In the present case, if the plaintiff has any remedy, he can have it against the defendant, who did the wrongful act, without inquiring whether he acted by the command of his father.

In the present case, however, we are of the opinion, that if he has suffered any damage, it was occasioned by his own wrongful act, in permitting his cattle to trespass on the land of the defendant's father. Whenever any person finds the cattle of another wrongfully in his enclosures, he may turn them out, and if they stray away and are lost, it is because the owner has not taken sufficient care to keep them within his own enclosures. The defendant, who acted under the command of his father, was fully justified in turning the horses into the road, and was under no obligation either to drive them to the public pound, or to the house of the owner.

The decision, which was read from the reports in the state of New Hampshire,¹ is in accordance with the principles of the common law, well established, and of undoubted authority.

The judgment of the County Court must, therefore, be reversed and a new trial granted.

¹ Cory v. Little, 6 N. H. 218.

BAXTER v. BUSH.

(29 Vt. 465.)

Supreme Court of Vermont. Orleans. May, 1857.

"Trove for a quantity of hay, *466 grain and potatoes. Plea, the general issue. Trial by jury, June Term, 1856, — UNDERWOOD, J., presiding. The plaintiff introduced a lease of a farm, dated April 1, 1853, and evidence to prove that the defendant raised on said farm hay, oats and potatoes to the value of more than seventy dollars; and that just prior to the commencement of this suit he demanded said produce of said farm; and also evidence that the rent mentioned in the lease had not been paid; and it was conceded that the crops were worth more than the rent. The lease above referred to was as follows: "This indenture made this first day of April, A. D. 1853, by and between William H. Baxter, of Barton, of the one part, and Samuel G. Bush, of Irasburgh, both in Orleans county, state of Vermont, of the other part, witnesseth: that the said Baxter, for the consideration of sixty-seven dollars and fifty cents, to be paid in eight months from date, hath demised, granted and to farm let unto the said Bush, and doth hereby demise, grant, and to farm let unto the said Bush, his heirs executors and assigns, all of that piece or parcel of land in Irasburgh deeded to said Baxter by John and Maria Huntington the 17th of December, A. D. 1852, with all the privileges and appurtenances thereunto belonging; the said Baxter retaining a full lien on all the crops and produce of said farm as security for the payment of said specified rent. To have and to hold said leased premises to the said Bush, his heirs and assigns for the term of one year from this date. And the said Bush, for himself, his heirs, executors and assigns, doth covenant and agree to pay or cause to be paid the aforesaid rent, and to improve and cultivate said premises in a good, husbandlike manner, and at the end of said term surrender the possession of said premises to the said Baxter, and also to give a full lien on the crops as security for the payment of said rent of sixty-seven dollars and fifty cents as aforesaid. In witness whereof we have hereunto set our hands and seals this 1st day of April, A. D. 1853. WILLIAM H. BAXTER, [L. s.] SAMUEL G. BUSH. [L. s.]"

The defendant's evidence proved *467 that he was a minor when said lease, and also when said demand was made, and that he did not arrive at his majority until the 28th of September, A. D. 1853; that when said lease was executed the defendant gave his note, signed by himself and his mother, as surety for said rent, which had never been surrendered; and that the plaintiff had brought a suit on the note given for the rent, and that the plaintiff had a suit then pending for the rent reserved in said lease. The defendant insisted that the terms of the lease did not give the plaintiff a property in the crops, such as would entitle him to recover, but the court ordered a verdict for the amount

of the rent reserved in the lease and the interest, to which the defendant excepted.

J. P. Sartle, for plaintiff. Cooper & Bartlett, for defendant.

ISHAM, J. The property for which this action is brought is the produce of a farm leased by the plaintiff to the defendant for the term of one year from and after the first of April, 1853. Its conversion by the defendant is not disputed. The questions arise, whether the plaintiff has that interest or title to the property itself, which will enable him to sustain the action of trover; and whether the infancy of the defendant constitutes a defense. To sustain the action, the plaintiff must show a title to the property converted, either general or special, and his right to the immediate possession of it. The lease contains the provision that the plaintiff shall have a full lien on the crops of that year as security for the payment of the rent of sixty-seven dollars and fifty cents. If this provision is sufficient to give the plaintiff a title to the crops, there

*is no doubt as to his right to recover to the extent of his lien, as it is conceded that their value is equal to the amount due for rent. In the case of Paris v. Vail, 18 Vt. 277, and Smith v. Atkins, ib. 464, the lease contained the provision that the crops were to be and remain the sole property of the plaintiff as a lien and security for the payment of the rent, and for the performance of all the covenants and stipulations therein. There is no difference in principle between that case and the one under consideration. The plaintiff in that case was to have the sole property in the crops as a lien. It was only to that extent and for that purpose his sole right of property existed. In this case, also, it is a matter of express provision that the plaintiff is to have a lien for the same purpose. He has to that extent and for that object the sole ownership. It is a legal implication in this case, what was expressed in the other. The parties obviously intended that the plaintiff should be the owner and have the control of the crops until the rent for that year was paid, and in all stipulations of that character the intention of the parties should be the rule of construction. The doctrine is well settled that a party may transfer a title to crops, though not then *in esse*, and which are to be grown upon the land, and the property will pass as soon as they are grown. That was the very point determined in the cases of Paris v. Vail, and Smith v. Atkins, above cited. The same rule is sustained in England, and in other American cases, and applies not only to the produce of land, but to other cases of contracts where the property is not *in esse* at the time; Grantham v. Hawley, 14 Viner Abg. 72; Leslie v. Guthrie, 1 Bing. 697; 8 Price 269; Langton v. Horton, 1 Hare, 549; Mitchell v. Winslow, 6 Law Rep. 347; Lewis v. Lyman, 2 Pick. 437. The principles and reasoning upon which that doctrine is founded are fully considered by the court in the cases of Paris v. Vail, and Smith v. Atkins, and to which,

¹ Fed. Cas. No. 9,673.

for that purpose, it is only necessary to refer.

In the case of *Brainard v. Burton*, 5 Vt. 97, it was held, that a similar provision in a lease was merely an executory contract, and that the lessor acquired no general or qualified property in the crops before they were grown and delivered to him by the lessee. That case, however, is not *470 now regarded as being sound in principle, and is virtually overruled by the cases of *Paris v. Vail*, and *Smith v. Atkins*, 18 Vt. 464.

The fact that at the time the lease was made the plaintiff took the defendant's note, with surety, for the rent, has no effect upon the plaintiff's title to this property. He had a right to take the note and also the additional security of a lien upon the crops grown upon the farm, and to pursue his legal remedies upon each and all of them until satisfaction for the rent is ob-

tained. It is not a lien created by law merely, but by the act and express stipulation of the parties.

The infancy of the defendant constitutes no defense to this action. It appears that he came of age in September, 1853, but continued in the occupation of the premises during that year. His conversion of this property was a tortious act. His liability in this case does not arise from any breach of contract, but for an unlawful appropriation to his own use of the plaintiff's property. In such cases infancy is no defense to the action of trover or trespass; *Green v. Sperry*, 16 Vt. 392. The fact, also, that he continued in possession of the premises during the year, and long after he came of age, is a ratification of the tenancy, and renders obligatory upon him the provisions of the lease.

The judgment of the county court must be affirmed.

NASH v. JEWETT.

(18 Atl. 47, 61 Vt. 501.)

Supreme Court of Vermont. Bennington.
June 27, 1889.

Exceptions from Bennington county court.
Action of trespass on the case, brought by John Nash against Thomas F. Jewett. A demurrer to the declaration was sustained, and plaintiff excepted.

James B. Meacham and G. H. Mason, for plaintiff. *Batchelder & Bates*, for defendant.

TYLER, J. The plaintiff brings this action against the defendant to recover the damages which he claims to have sustained in consequence of the defendant having falsely and fraudulently represented to him that he was of the full age of 21 years, whereby the plaintiff was induced to sell the defendant certain goods and merchandise, and to take his promissory note therefor. The defendant pleads infancy, and the case comes to this court on demurrer to the plea. Cases involving substantially the same question that is here presented have been decided by this court, and a full review of the authorities is unnecessary. It was held in *West v. Moore*, 14 Vt. 447, and *Morrill v. Aden*, 19 Vt. 505, that to an action on the case for a false and deceitful warranty of a horse infancy was a good defense, and in *Gilson v. Spear*, 88 Vt. 315, that an infant was liable in an action *ex delicto* for an actual and willful fraud only in cases in which the form of action did not suppose that a contract existed; but, where the *gravamen* of the fraud consisted in a transaction that really originated in contract, the plea of infancy was a good defense. In *Doran v. Smith*, 49 Vt. 353, the defendant falsely and fraudulently represented that he was the owner of certain property, and had good right to sell the same, and the plaintiff, confiding in such representations, bought the property, and paid the defendant therefor. The property was not in fact the defendant's, and the plaintiff was compelled to surrender it to the true owner, yet a plea of infancy to the declaration in case was held good on demurrer. The plaintiff's counsel insist that a legal distinction can be drawn between the above cases and the one at bar in that in the present case the false and fraudulent representation was antecedent to, and disconnected with, the contract, although it was the inducement to it.

While it is true, as a general proposition of law, that infants are liable for their torts, yet the form of action does not determine their liability, and they cannot be made liable when the cause of action arises from a contract, although the form is *ex delicto*. A reference to the declaration in the case shows that the representations made by the defendant as to his age, using the concise language of Chief Justice PIERPOINT in *Doran v. Smith*, *supra*, "enter into and constitute an

element of the contract itself; it is that that makes them actionable. The contract must be alleged and proved or there can be no recovery. The contract is the basis of the action. The fraud is predicated upon the contract." Benjamin in his work on Sales, p. 22, lays down the general rule that an action at law will not lie against an infant for fraudulently representing himself of full age, and thereby inducing the plaintiff to contract with him, and cites many authorities in support of the rule; but in his notes on page 442 he says that an infant may be held liable for a false statement as to his age if he afterwards successfully refuses to pay on the ground of infancy. The decision in *Fitts v. Hall*, 9 N. H. 441, which is referred to approvingly by REDFIELD, J., in *Towne v. Wiley*, 23 Vt. 355, is relied upon by the plaintiff's counsel in this case; but that decision was not an authority in point in *Towne v. Wiley*. In that familiar case an infant, who had hired a horse of a livery stable keeper to drive to an agreed place 23 miles distant, returned by a circuitous route nearly double that distance, left the horse standing out of doors during the night, and it died from overdriving and exposure. It was held that the infant was liable in trover for a conversion of the property by departing from the object of the bailment, the same as if he had taken it in the first instance without permission. In his opinion in that case Judge REDFIELD said: "In all the cases, then, upon this subject, it will be found, that the courts profess to hold infants liable for positive substantial torts, but not for violations of contract merely, although, by construction, the party claiming redress may be allowed, by the general rules of pleading, to declare in tort, or contract, at his election." In *Fitts v. Hall*, the infant had rescinded the contract by which goods had been sold to him, and his note taken therefor on the false representation that he was of age, and had refused, on demand, to return the property. PARKER, C. J., who delivered the opinion, said in the subsequent case of *Burley v. Russell*, 10 N. H. 184: "That decision is that an infant is liable in case for a fraudulent affirmation that he is of age, whereby another is induced to enter into a contract with him, if he afterwards avoids the contract by reason of his infancy."

We think no distinction in principle can be drawn between this case and former cases referred to, decided by this court, and the judgment of the county court is affirmed.

NOTE.

INFANCY—FRAUD. Where an infant falsely and fraudulently represents that he is of full age, he is liable in an action *ex delicto* for the injury resulting, from thereby inducing one to deliver him property. *Rice v. Boyer*, (Ind.) 9 N. E. Rep. 420. In this case ELLIOTT, C. J., says: "This result does not involve a violation of the principle that an infant is not liable where the consequence would be an indirect enforcement of his contract; for the recovery is not upon the contract, * * * nor is he made to pay the contract price of the article purchased by him, as he is only held to an-

swer for the actual loss caused by his fraud." In such a case the fraud justifies the rescission of the sale, and, if the infant has disposed of the goods, his vendor can replevy them, unless the infant's vendee shows that he was a bona fide purchaser. *Neff v. Landis*, (Pa.) 1 Atl. Rep. 177. But in *Conrad v. Lane*, (Minn.) 4 N. W. Rep. 695, it is held that, in an action in the nature of assumpsit

to recover the value of goods, not necessaries, sold and delivered to an infant, he is not estopped to set up his infancy as a defense by the facts that, at the time of the sale, he represented himself to be of age, and the goods were sold to him on the faith of such representations. See, also, *Burdett v. Williams*, 80 Fed. Rep. 697; *Vogelsang v. Null*, (Tex.) 8 S. W. Rep. 451.

STATE v. TICE.

(2 S. W. 269, 90 Mo. 112.)

Supreme Court of Missouri. December 6, 1886.

Appeal from circuit court, Polk county; Hon. Ben. V. Alton, Judge.

Indictment for assault, and conviction. Defendant appeals.

J. B. Upton, for appellant. B. G. Boone, Atty. Gen., for the State.

SHERWOOD, J. The defendant, a boy under the age of 14 years, became involved in a school-boy scuffle, resulting in a fight, at or near the close of which he cut the one with whom he was scuffling with a pocket knife; hence the prosecution, which terminated in a verdict of guilty, and a fine of \$100. Under seven years of age an infant cannot be guilty of felony. In the interval between that age and that of 14 years he is prima

facie adjudged to be *doli incapax*. And when an infant is arraigned for a felony, this disputable presumption of the law—for the onus in such cases is on the state—is to be rebutted; and the “evidence of that malice which is to supply age ought to be strong and clear, beyond all doubt and contradiction.” 4 Bl. Comm. 24. In this way only can the legal maxim be applied that *malitia supplet aetatem*. Here there was no attempt made by the state to prove that the boy in question was possessed of that “mischievous discretion” which supplies the place of age, and rendered him amenable to legal punishment. This case, therefore, falls within the rule announced in *State v. Adams*, 76 Mo. 355; and, as there was no evidence on which to base it, any instruction bottomed on the theory that defendant, by reason of his intelligence, was capable of crime, was necessarily erroneous.

Therefore judgment reversed, and cause remanded. All concur.

STANDARD OIL CO. v. GILBERT et al.
 (11 S. E. 491, 84 Ga. 714.)

Supreme Court of Georgia. March 31, 1890.

Error from city court of Savannah; HARDEN, Judge.

Denmark, Adams & Adams, for plaintiff in error. Garrard & Meldrin, for defendants in error.

BLECKLEY, C. J. There was no dispute or controversy as to the facts. Their legal significance—nothing else—was for determination; the parties having agreed that the only question should be whether the contract could be terminated before October 1st by the notice of December 15, 1886. The presiding judge decided this question in the negative, and directed a verdict accordingly. The notice referred to, dated December 15, 1886, was in these terms: "Owing to the present low prices of oil, and the possibility of a continuance of the same, we cannot, after December 31, 1886, continue to allow you \$75 per month rebate, as heretofore. We solicit a continuance of your orders, and will be glad to allow you jobbers' rebate, the same we are now paying the other merchants." The contract between the parties, as originally made, was in writing. It bore the date October 1, 1880. The obligations which it imposed on the agents (Gilbert & Co.) were these: (1) To sell coal oil for their principals at such prices as the latter might fix from time to time; (2) to handle no other oil for the period of one year from the date of the contract; (3) to receive the oil at their wharf, and store it in their warehouse, without charge for wharfage or storage; (4) to pay on the 10th of each month for all oil sold during the previous month. The obligations imposed upon the principals were (1) to pay to the agents \$75 per month for one year from the date of the contract; (2) to keep them supplied with merchantable oil at all seasons of the year; (3) to deliver the oil at their wharf or warehouse; (4) to pay them one dollar per barrel on the excess, if any, over 900 barrels sold by them during the year for which the agreement was made. Within a month or two after the year expired the contract was renewed, as the result of written correspondence for a second year, terminating October 1, 1882. No subsequent negotiations took place, but the parties continued to deal in harmony with the terms of the written contract through all subsequent years, up to December 15, 1886, when the notice above recited was given. Afterwards, and until October of the following year, their dealings went on, but the oil sent during that period was furnished and received without prejudice to the claim of either party. The credit of \$75 per month in the oil account, as kept by the principals, ceased with December, 1886, and from that time forward the credits entered as rebates amounted in the aggregate to only \$18.84. In other words, compensation for nine months, which, according to the written contract, would be \$675, was reduced to \$18.84. To which of these sums were the agents entitled?

According to its letter, the notice did not seek to terminate the contract in any respect except as to the amount of compensation. It merely warned the agents that the principals would not pay as they had done theretofore, but would substitute the ordinary rebates allowed the trade. It did not propose to discharge the agents from any of their obligations, which, as we have seen, were not to handle any other oil, to receive and store without charge, and to pay unconditionally on the 10th of each month for all oil sold during the previous month. It admits of no doubt that the notice thus construed would not be effective for any purpose. But construing it, as both parties probably did, to be an effort to terminate the agency altogether, and release both parties from any and all obligation as to future dealings after January 1, 1887, the question is, was there a legal right so to do? We think not. It is clear that during the first or second year both parties were bound, not from month to month only, but throughout the year, as there was an express undertaking on the part of the oil company to keep the agents supplied with oil at all seasons of the year, and to pay them \$75 per month for one year. The case does not fall within the principle of such cases as Burton v. Railway Co., 9 Exch. 507; Rhodes v. Forwood, L. R. 1 App. Cas. 256; and Orr v. Ward, 73 Ill. 318,—in which it was ruled that it was not obligatory on the employer to furnish business to the agent or employee throughout the whole period embraced in the contract, the reason of such ruling being that the employer had not stipulated so to do. Here, on the contrary, the stipulation was no less express on behalf of one party than of the other. If such a notice as we are considering would not have dissolved the engagement pending the first or second year of the service, it could not have that effect pending the seventh year, unless, by reason of not having been expressly renewed or continued after the second year, it ceased to be a contract for a whole year, and became indefinite as to time, or a contract at will only. Tested by the law of ordinary hiring, or of master and servant, there can be no doubt that services rendered without a new agreement, after the contract term has expired, are to be compensated at the same rate, and to that extent the prior contract is renewed or continued in force. Iron Factory v. Richardson, 5 N. H. 294; Wallace v. Floyd, 29 Pa. St. 184; Ranck v. Albright, 36 Pa. St. 367; Nicholson v. Patchin, 5 Cal. 474; Vail v. Manufacturing Co., 32 Barb. 584; Weise v. Board, 51 Wis. 564, 8 N. W. Rep. 235. And, where the term of employment does not exceed one year, the authorities seem to us decisive that the prior contract is renewed or continued for an equivalent time, as well as at an equal rate. "Where the hiring is under a special agreement, the terms of that agreement must, of course, be observed. If there be no special agreement, but the hiring is a general one, without mention of time, it is considered to be for a year certain. If the servant continue in employment beyond that year, a contract for a second year is implied, and so on."

Smith, Merc. Law, 286; Pomeroy's Smith, Merc. Law, § 508. "Where a person has been employed by another for a certain definite term at fixed wages, if the services are continued after the expiration of the term in the same business, it is presumed that the continued services are rendered upon the same terms; but this is a mere presumption, which may be overcome by proof of a new contract, or of facts and circumstances that show that the parties in fact understood that the terms of the old contract were not to apply to the continued services." Wood, Mast. & S. § 96. "A person who has been previously employed by the month, year, or other fixed interval, and who is permitted to continue in the employment after the period limited by the original employment has expired, will, in the absence of anything to show a contrary intention, be presumed to be employed until the close of the current interval, and upon the same terms." Mechem, Ag. § 212. "Tacit relocation is a doctrine borrowed from the Roman law. It is a presumed renovation of the contract from the period at which the former expired, and is held to arise from implied consent of parties, in consequence of their not having signified their intention that the agreement should terminate at the period stipulated. * * * Though the original contract may have been for a longer period than one year, the renewed agreement can never be for more than one year, because no verbal contract of location can extend longer." Fras. Mast. & S. 58. This last is a Scotch authority, but on this question the law of Scotland seems to coincide with our own, and with the law of Louisiana. See Alba v. Moriarty, 36 La. Ann. 680; Lalande v. Aldrich, (La.) 6 South. Rep. 28; Tallon v. Mining Co., 55 Mich. 147, 20 N. W. Rep. 878; Sines v. Superintendents of the Poor, 58 Mich. 503, 25 N. W. Rep. 485; Iron Co. v. Carpenter, 67 Md. 554, 11 Atl. Rep. 178; Tatterson v. Manufacturing Co., 106 Mass. 56; Capron v. Strout, 11 Nev. 304; Beeston v. Collyer, 4 Bing. 309.

In the argument notice was taken of the difference between the English and the American rule as to presuming that an indefinite hiring is for a whole year. It was said that in the former country this presumption holds, but in the latter it does not. Wood, Mast. & S. § 136. We think, however, this presumption has nothing to do with the matter; for wheth-

er the first hiring has its duration fixed by express or implied contract, if it be fixed in either way, the term (if not longer than one year) admits of duplication by tacit as well as express agreement. When we have a definite term of service, no matter how we get it, subsequent service of the same kind, where no new contract is made and nothing appears to indicate a change of intention, may be referred to the previous understanding, and to a tacit renewal of the engagement.

Thus far we have dealt with the question without any special reference to the law of agency, as distinguished from that of master and servant generally. This was a commercial agency, comprehending, not only personal services, but the use of a wharf for landing the oil, and of a warehouse for storing it, and attended with a guaranty of the proceeds of all sales, the agents being obliged to pay within 10 days for the oil sold in each month. The agents, if not *de credere* agents technically, were upon the same footing as such; they had to pay for all the goods they sold. No doubt the power of revoking the agency pending a current year's business existed, but the right to revoke it without sufficient cause did not exist, and a wrongful revocation leaves the principal liable to make reparation to the agent. Mechem, Ag. §§ 209, 614, 620, 621; Code, § 2183. Here no cause was assigned but the low price of oil, and the prospect of its continuance. Neither of the parties had retired, or, so far as appears, wished to withdraw from business; and, according to the evidence, 15 days' notice would be too short a time within which to make arrangements with other dealers for oil. To do that would require several months. We can see nothing whatever in the record to justify a revocation of the agency by such a notice as was given, and we agree with the presiding judge in the opinion that the oil company had no legal right to terminate the contract before October 1, 1887, without mutual consent. The engagement was one from year to year, and not merely at the will of either party. There was no contention that the amount claimed by the defendants in excess of the plaintiffs' demand was more than they ought to recover upon their plea of set-off, if they were entitled to recover at all; and, the verdict being for that amount, it was correct, and the court did not err in refusing a new trial. Judgment affirmed.

SULLIVAN v. HERGAN.

(20 Atl. 232, 17 R. I. 109.)

Supreme Court of Rhode Island. July 12,
1890.

On petition for a new trial.

Patrick J. Galvin, for plaintiff. *Francis B. Peckham* and *William P. Sheffield, Jr.*, for defendant.

MATTESON, J. This is an action of *assumpsit* to recover moneys claimed to be due to the plaintiff from the defendant under a contract of hiring. It appears from the evidence reported that the plaintiff was employed by the defendant in his business of a dealer in groceries and liquors, as bar-tender and clerk, from November 27, 1886, until April 19, 1888, and was to receive as wages \$18 per month until May 1, 1887, and \$25 per month thereafter. At the trial the defendant set up as a defense the illegality of the contract, the sale of liquors being prohibited by law when the contract of hiring was made, and during the period of the plaintiff's employment. The jury returned a verdict for the plaintiff for \$187.84. The defendant moves for a new trial, on the ground that the verdict is against the law and the evidence.

The principle that if a contract or promise be founded on a legal and an illegal consideration, and the illegal consideration cannot be separated from the legal, and rejected, the illegality of part vitiates the whole, so that no action can be maintained upon it as a contract, is conceded; but it is suggested that, inasmuch as the contract is illegal and void, and is therefore, as it is contended, a nullity, the plaintiff is entitled to recover for that portion of his services performed as clerk in the grocery part of the business, upon a *quantum meruit*, what such services were reasonably worth, and therefore that the verdict may be supported. We do not, however, agree with the suggestion. Although a contract thus infected with illegality is regarded in law as a nullity, in so far that the law will not lend its aid to enforce it, it is nevertheless not treated as if it had no existence in fact. The illegality extends to every part of the transaction, and it cannot, therefore, be made the foundation of an *assumpsit*. Both parties are *in pari delicto*, and the law will, for that reason, not aid either party to enforce the contract, but leaves them where it finds them. It may sometimes happen, in consequence, that a defendant may gain a pecuniary benefit by reason of his wrong-doing, or of that in which he has equally participated; but it is not for the sake of the defendant that his objection to his own illegal contract is sustained. In *Holman v. Johnson*, Cowp. 341, 343, Lord MANSFIELD remarks: "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of,

contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or from the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because it will not lend its aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *potior est conditio defendantis*." *Birby v. Moor*, 51 N. H. 402, is a case strongly in point. In that case it appears that the defendant kept a billiard saloon and a bar for the sale of liquor. The liquor traffic was illegal. The plaintiff was employed by the defendants to work generally in and about the saloon. There was no special agreement that he should or should not sell liquor, or what particular duty he should do. But he was accustomed to work generally in and about the saloon, taking care of the room, building fires, taking care of the billiard tables, tending bar, and waiting upon customers, and, in the absence of the defendant, he had the whole charge of the business. In *assumpsit*, upon a *quantum meruit*, it was held that he could not recover compensation for any portion of his services. The court say: "In the present case, however, there is room for but one conclusion, namely, that the agreement was that the plaintiff at the defendant's request should perform all the services which he did in fact perform, and that the defendants, in consideration of the promise to perform (and the performance of) all those services, the illegal as well as the legal, should pay the plaintiff the reasonable worth of the entire services. In other words, the plaintiff made an entire promise to perform both classes of services. This entire promise (and the performance thereof) formed an entire consideration for the defendant's promise to pay, and a part of this indivisible consideration was illegal." In the present case the sums which the defendant promised to pay formed one entire consideration for all the services to be rendered by the plaintiff, both those in tending the bar, which were illegal, and those as clerk in the grocery store, which were legal. Had one price been agreed upon for the services as bar-keeper, and another as clerk in the grocery business, so that it would have been possible to separate the legal from the illegal part of the transaction, an action could have been maintained for the services which were legal; but, as it is, the defendant's promise being entire, and the consideration for it being partly legal and partly illegal and indivisible, both parties are to be regarded as equally in fault, and the law will lend its aid to neither. Petition granted.

DISBROW v. DURAND.

(24 Atl. 545, 54 N. J. Law, 343.)

Court of Errors and Appeals of New Jersey.
June 20, 1892.

Error to circuit court, Union county; before Justice Van Syckel.

Suit by Sarah A. Disbrow against James H. Durand, administrator of Smith Noe, deceased, to recover for the value of services performed as housekeeper for deceased. On a judgment of nonsuit, plaintiff brings error. Affirmed.

The plaintiff below, who is also the plaintiff in error, sued the administrator of her deceased brother's estate for the value of her services as that brother's housekeeper for the six years which immediately preceded the brother's death; that is, for the value of her services from January 1st, 1883, to January 1st, 1889. It was proved, on her behalf, at the trial in the circuit court, that the decedent resided upon and cultivated a small farm near Rahway, in Union county; that prior to 1864 his mother lived with him, and that during his mother's life his sister, the plaintiff, then a widow, came to reside with him, bringing with her her son. During the year 1864 the son, having become a man, went away and married. The mother, sister, and brother continued to live together as one family until the mother died, and thereafter the brother and sister continued to live together for more than 20 years, until the brother died in January, 1889. The brother cultivated the farm, and the sister kept the house. The sister had no means of subsistence except through work for strangers, or by continuing her home with her brother, or making it with her son. The son offered to take her, but he admits that he did not insist strenuously upon her coming to him. It was plainly apparent in the proofs that she preferred to remain with her brother. No proof was offered to show either an express or implied contract, upon the part of her brother, to remunerate her for her services in his household, or that the subject of compensation for such services was ever discussed between the brother and sister, or contemplated by either of them. Upon this case the judge at the circuit directed that judgment of nonsuit be entered against the plaintiff. Error is now assigned upon exception to that direction.

Benjamin A. Vall, for plaintiff in error.
Thomas H. Shafer, for defendant in error.

McGILL, Ch. (after stating the facts). Ordinarily, where services are rendered and voluntarily accepted, the law will imply a promise upon the part of the recipient to pay for them; but where the services are rendered by members of a family, living as one household, to each other, there will be no such implication, from the mere rendition and acceptance of the services. In order to recover for the

services, the plaintiff must affirmatively show either that an express contract for the remuneration existed, or that the circumstances under which the services were rendered were such as exhibit a reasonable and proper expectation that there would be compensation. The reason of this exception to the ordinary rule is that the household family relationship is presumed to abound in reciprocal acts of kindness and good will, which tend to the mutual comfort and convenience of the members of the family, and are gratuitously performed; and, where that relationship appears, the ordinary implication of a promise to pay for services does not arise, because the presumption which supports such implication is nullified by the presumption that between members of a household services are gratuitously rendered. The proof of the services, and, as well, of the family relation, leaves the case in equipoise, from which the plaintiff must remove it or fail. The great majority of cases in which this exception to the ordinary rule has been given effect have been between children and their parents, or the representatives of the parents' estate; and that fact appears to have led the courts of some of our sister states to speak of it as restricted to cases where such a relationship in blood existed; but it is not perceived how, within the reason for the exception, it is to be limited by mere propinquity of kindred. It rests upon the idea of the mutual dependence of those who are members of one immediate family, and such a family may exist, though composed of remote relations, and even of persons between whom there is no tie of blood.

To this time, in this state, the cases which have treated of this subject have dealt only with the relation of parent and child, or the case where one party stands *in loco parentis*, (*Ridgway v. English*, 22 N. J. Law, 409; *Updike v. Titus*, 13 N. J. Eq. 151; *Smith v. Smith's Adm'r's*, 23 N. J. Law, 208; *Coley v. Coley*, 14 N. J. Eq. 350; *Updike v. Ten Broeck*, 32 N. J. Law, 105; *Horner v. Webster*, 33 N. J. Law, 387, 411; *Prickett v. Prickett*, 20 N. J. Eq. 478; *Gardner v. Schooley*, 25 N. J. Eq. 150; *Miller v. Sauerbier*, 30 N. J. Eq. 71; *Smith v. Smith's Adm'r*, Id. 564; *De Camp v. Wilson*, 31 N. J. Eq. 658; *Kendall v. Kendall*, 36 N. J. Eq. 91, 99; *Stone v. Todd*, 49 N. J. Law, 280, 8 Atl. 300;) but they have not limited the exception to that relation. On the contrary, in *Updike v. Titus*, *supra*, Chancellor Green expressed the opinion that it contemplates "children, parents, grandparents, brothers, stepchildren, and other relations." And in this court in *Horner v. Webster*, *supra*, Mr. Justice Depue approvingly referred to the exception as applicable to all cases where the parties stand "in relation to each other of support on one side and services on the other." Without this state, also, I find most reliable authority extending the exception beyond parent and child, where close family relationship has been shown to exist. For instance, it was given effect in *Robinson*

v. Cushman, 2 Denio, 152; Scully v. Scully, 28 Iowa, 548; Keegan v. Malone, 62 Iowa, 208, 17 N. W. 461; and Hall v. Finch, 29 Wis. 278,—in each of which cases the relation was brother and sister; and in Bundy v. Hyde, 50 N. H. 116, where the relation was brother-in-law and sister-in-law. In the two Iowa cases cited the exception was stated in this language: "Where it is shown that the person rendering the services is a member of the family of the person served, and receiving support therein either as a child or relative, or a visitor, a presumption of law arises that such services were gratuitous, and, in such case, before the person rendering the service can recover, the express promises of the party served must be shown, or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation by one receiving and by the other making compensation therefor." I have not pretended to examine the many cases upon this subject in the several states. That would be a tedious,

exhaustive, and, indeed, profitless task. The exception stands upon a reason which logically and properly must extend to all members of a household, however remote their relationship may be, and, indeed, even to those who, though not of kin, stand in the situation of kindred in one household. The proofs offered at the trial in the present case exhibited the existence of a family relationship for a quarter of a century, from which the brother and sister each derived substantial benefit in the services of the other, and that the services rendered by each were natural and appropriate acts in their respective spheres, looking to the maintenance of the common home. It did not appear that in that long period of time either of them entertained the thought of demanding or having compensation from the other. It is deemed that the case is well within the exception to the ordinary rule which has been pointed out. There was no error in granting the nonsuit.

The judgment will be affirmed.

FRARY v. AMERICAN RUBBER CO.

(53 N. W. 1156, 52 Minn. 204.)

Supreme Court of Minnesota. Jan. 18, 1893.

Appeal from district court, Ramsey county; Brill, Judge.

Action by A. C. Frary against the American Rubber Company on a contract. Judgment for defendant. Plaintiff appeals. Affirmed.

William G. White, for appellant. H. J. Horn, for respondent.

GILFILLAN, C. J. Plaintiff, then a resident of Boston, Mass., and the defendant, a corporation, whose principal place of business was the same place, entered into this contract: "Boston, Dec. ___, 1890. We agree to pay A. C. Frary (\$250) two hundred and fifty dollars per month from Jan. 1, 1891, to April 1, 1892, for his services in carrying on our business in St. Paul to our satisfaction and under our control. American Rubber Company. R. D. Evans. I hereby accept the above. A. C. Frary." May 27, 1891, defendant discharged plaintiff from July 1st following, giving no other reason for it than that his conduct of its business was not to its satisfaction. If this contract reserved to defendant the right to discharge plaintiff at any time merely because it might be dissatisfied with his conduct of the business, whether it had sufficient reason to be so or not, it may have been an injudicious one for plaintiff to consent to; but there can be no question that the parties might make such a contract, and, if that is what this contract was intended to be, they must abide by it. In *Butler v. Mill Co.*, 28 Minn. 205, 9 N. W. 697, a contract of hiring left it to the hirer to determine what it should consider right and proper to pay for the services, and it was held that if it did so honestly and in good faith its determination was final. The cases—of which there are a great many in the books—involving stipulations more or less similar to that in this contract do not deny the capacity of the parties to stipulate that what is to be done by one of them shall be to the satisfaction of the other before any liability on the part of the latter shall arise, and to make his decision that he is not satisfied final. It would hardly be profitable to review the decisions in detail. Those which have refused to hold the parties to such a stipulation according to its letter have generally done

so, we apprehend, not because the parties were not bound, if such were their contract, but because it was not the contract. It is a matter of construction. In construing such contracts the nature or character of the thing stipulated to be done, the chief purpose the parties had in view, are potent considerations. Where they have had in view to satisfy the taste, feelings, sensibility, or judgment of the party, the decisions have generally held that the stipulation that the thing to be done must be to his satisfaction was absolute, and his decision that it was not to his satisfaction was intended to be final and unquestionable. On the other hand, where the chief thing the parties have had in mind was to effect some definite purpose or end, of the performance of which others could judge just as well as the parties could, and which involved no considerations strictly personal, the stipulation that it should be done to the satisfaction of the party has been generally held not to be controlling. Of the first of these classes of cases, the painting of a portrait to the party's satisfaction is one instance. *Follard v. Wallace*, 2 Johns. 395, where the contract sued on stipulated that, in case the title conveyed to the parties in fee should prove good and sufficient in law against all other claims whatsoever, they would pay a specified sum three months after they should be well satisfied that they held the land undisputed by any person whatsoever, and against all claims, is an instance within the second class. A contract employing a servant not to do a fixed and definite work, (as, for instance, to build a specified kind of fence,) but to render personal services, general in their nature, and especially where the employment involves considerations of fitness, business capacity, integrity, trust, and confidence, such as in this case, comes within the first class. Certainly no third person could judge whether the performance should come up to what was expected when the contract was made so well as the employer could. There is every reason to suppose that when the parties inserted the words "to our satisfaction" they meant just what they said. There is nothing in the evidence to suggest that the defendant did not discharge plaintiff for the sole reason that it was in good faith dissatisfied with his conduct of the business. There is nothing in any assignment not covered by what we have already said.

Order affirmed.

GRIGGS v. SWIFT.

(9 S. E. 1062, 82 Ga. 392.)

Supreme Court of Georgia. July 31, 1889.

Error from superior court, Muscogee county; SMITH, Judge.

*Thomas W. Grimes and Peabody, Bran-
non & Hatcher*, for plaintiff in error. *Mc-
Neill & Levy*, for defendant in error.

BLECKLEY, C. J. The hiring was by the partnership, for the term of one year from September 1, 1886, at \$50 per month, besides board. One of the two partners of which the firm consisted died in November, and the survivor discharged the plaintiff on the 1st of January. The plaintiff could obtain no other employment until the following July; and, after the year expired for which he was hired by the partnership, he brought this action, claiming the agreed compensation from the 1st of January, the time of his discharge, up to the date in July when he procured other employment, and his expenses for board during the same period. As there is no trace in the evidence that the partnership was, by the terms of its creation, to subsist or continue after the death of one of its members, such death wrought a dissolution, and forever terminated the partnership. Code, §§ 1892, 1894. One of the parties, therefore, to the contract of hiring, became extinct by the act of God. The Code declares (section 2871) that if performance is impossible and becomes so by the act of God, such impossibility is itself equivalent to performance. There being no one, after the partnership went out of existence, to receive the personal services which the plaintiff had contracted to render as inspector of farms and collector for the partnership, the further execution of the contract was as much impossible as if the plaintiff himself had died before or after a dissolution of the firm had taken place. The survivor transacted no new business on the partnership account, but confined operations to closing up the firm affairs. The classification of every contract must depend upon a rational interpretation of the intention of the parties. Code, § 2721. From the very nature of a contract for the rendition of personal services to a partnership in its current business, where nothing is expressed to the contrary, both parties

should be regarded as having by implication intended a condition dependent, on the one hand, upon the life of the employé, and, on the other, upon the life of the partnership, provided the death in either case was not voluntary. To this effect is the text of Wood, Mast. & Serv. § 163: "Where a servant is employed by a firm, a dissolution of the firm dissolves the contract, so that the servant is absolved therefrom; but if the dissolution results from the act of the parties, they are liable to the servant for his loss therefrom; but if the dissolution results from the death of a member of the firm, the dissolution resulting by operation of law, and not from the act of the parties, no action for damages will lie. * * * So if a firm consists of two or more persons, and one or more of them dies, but the firm is not thereby dissolved, the contract still subsists, because one or more of his partners is still in the firm, and this is so even though other persons are taken into the firm. The test is whether the firm is dissolved. So long as it exists, the contract is in force, but when it is dissolved, the contract is dissolved with it, and the question as to whether damages can be recovered therefor will depend upon the question whether the dissolution resulted from the act of God, the operation of law, or the act of the parties." Mr. Wood's reference is to two Scotch cases, which we have not seen, but the rule he deduces from them is so reasonable that we feel warranted in accepting it as law. See, also, Tasker v. Shepherd, 6 Hurl. & N. 575. As to death of a person not a partner, but a sole employer, see Yerrington v. Greene, 7 R. I. 589; Wood, Mast. & Serv. §§ 95, 158. The case of Fereira v. Sayres, 5 Watts & S. 210, is apparently in conflict with the text of Wood as above quoted, but we are satisfied to abide by the rule laid down in Wood, though it be at the expense of differing with the learned court of Pennsylvania, by whom the last-named case was decided. The contract upon which the plaintiff's suit was founded having become impossible of performance by reason of death, he had no right to recover upon the same against the surviving partner for services never actually rendered, and there was no error in granting a nonsuit. Of course, the claim for board was on the same footing as that for wages. Judgment affirmed.

**BALTIMORE BASEBALL CLUB & EXHIBITION CO. OF BALTIMORE CITY
v. PICKETT.**

(28 Atl. 279, 78 Md. 375.)

Court of Appeals of Maryland. Jan. 12, 1894.

Appeal from superior court of Baltimore city; Albert Ritchie, Judge.

Action by John T. Pickett against the Baltimore Baseball Club & Exhibition Company of Baltimore City for breach of contract of hiring. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BOYD, and BRISCOE, JJ.

E. N. Rich and W. S. Bryan, Jr., for appellant. John M. Gallagher, for appellee.

BRISCOE, J. This suit was brought for the alleged breach of a special contract of hiring. The contract was made and entered into by and between the Baltimore Baseball Club, of the city of Baltimore, party of the first part, and John T. Pickett, of the city of Chicago, party of the second part, and is in these words: That "the said party of the second part agrees to play ball for the party of the first part, for the season of 1892, for the sum of three thousand (\$3,000) dollars, with five hundred dollars advanced on the contract, said sum of five hundred dollars (\$500) to be considered part of the said three thousand (\$3,000) dollars above stated; salary payable first and fifteenth of each month; services to commence on the 26th of March, 1892, and end on October 31st, 1892." The appellee, the plaintiff below, entered upon the services, and performed them until the 1st day of June, 1892, when he was discharged or released. He was paid the \$500 advance money, and also four payments on account of his salary. The grounds set up for his discharge were want of skill and ability. The judgment was for the plaintiff, and the defendant has appealed. At the trial there were 10 exceptions reserved to the rejection by the court of evidence offered by the defendant, the third, ninth, and tenth of which were abandoned at the hearing. There were also exceptions to the granting of the first, fourth, and fifth prayers of the plaintiff, and to the rejection of the first, third, sixth, and eighth prayers of the defendant, and to the instruction on the part of the court. These exceptions form the basis of this appeal, and we will pass upon them in their regular order.

There were two defenses relied upon by the appellant: First. That the plaintiff did not exercise that degree of skill and efficiency required of professional baseball players playing in the league or association to which the defendant belonged, and was discharged for inefficiency. Secondly. That there was a universal and well-known custom, observed by all professional baseball clubs, that the

club shall have the right, on 10 days' notice, to release any player who does not come up to the requirements of his position, and play satisfactorily; that the defendant received the 10 days' notice, and was discharged.

It will be observed that the contract in this case was a special one, for a precise period, definite in its terms, and is simply an ordinary hiring under a special contract. It is entirely silent as to the degree of skill the plaintiff should possess in the business for which he was employed. In the words of the contract, "he was to play ball for the Baltimore Baseball Club, the party of the first part, for the season of 1892." Now, it is a well-settled rule that the standard of comparison or test of efficiency is that degree of skill, efficiency, and knowledge which is possessed by those of ordinary skill, competency, and standing in the particular trade or business for which they are employed; and, as the contract provided for no higher degree of skill than this, none could be required. The supreme court of Pennsylvania lays down the doctrine to be: "Where skill as well as care is required in performing the undertaking, if the party purport to have skill in the business, and he undertakes for hire, he is bound to the exercise of due and ordinary skill in the employment of his art or business about it, or, in other words, to perform it in a workmanlike manner. In cases of this sort he must be understood to have engaged to use a degree of diligence and attention and skill adequate to the performance of his undertaking. 'Ordinary skill' means that degree which men engaged in that particular art usually employ, not that which belongs to a few men only, of extraordinary endowments and capacities." *Waugh v. Shunk*, 20 Pa. St. 133. Also, *Harmer v. Cornelius*, 5 C. B. (N. S.) 236; *Parker v. Platt*, 74 Ill. 432. This doctrine was fairly submitted to the jury by the first prayer of the plaintiff and the fourth prayer of the defendant, by which they were, in substance, told that if they found that the plaintiff did not possess and exercise the skill, knowledge, and efficiency possessed and exercised by other professional baseball players of ordinary skill, knowledge, and efficiency, and that he was discharged for such reasons, then their verdict must be for the defendant. A large number of witnesses, who had been professional baseball players for six or ten years, and who had played with the plaintiff, testified that they considered him a good player, and that he played an average good game of ball.

We pass now to the second question in the case. The contention on the part of the appellant is that the contract was made subject to a usage or custom that the club had a right to cancel the contract and discharge the player, on giving 10 days' notice, when the player is deficient in his playing. The contract is entirely silent upon this subject, and it is not admitted that the player had

the reciprocal right to abandon the club or to cancel the contract when he deemed it proper or right to do so. We have carefully examined the testimony, and find a failure of proof to establish any usage. The evidence was manifestly too vague and unmeaning to warrant, upon any principles, the submission of any proposition based upon it. The plaintiff testified "that he had been playing professional baseball for the past nine years; is familiar with the rules of the game, and had signed contracts for professional clubs; that he had never signed a contract with the ten days' clause; that he never even saw one, and knew of no custom by which a player could be discharged that way. That nothing was said about it when he signed." The authorities all hold that a usage, to be admissible, must be proved to be known to the parties, or be so general and well established that knowledge and adoption of it may be presumed, and it must be certain and uniform. *Foley v. Mason*, 6 Md. 51; *Second Nat. Bank v. Western Nat. Bank*, 51 Md. 128; *Bank v. Graffin*, 31 Md. 520; *Patterson v. Crowther*, 70 Md. 125, 16 Atl. 531. But, conceding that there was sufficient evidence of the custom and usage contended for by the appellant, we are clearly of the opinion that it was not admissible to vary the terms of this special contract. The contract, as we have said, is one for a definite term of service, and binding on both parties. To admit the usage would not only destroy its mutuality, but vary its terms. The supreme court of Rhode Island, in a similar case to the one now under consideration, held that "a local usage cannot be considered a part of a contract, when it contradicts that contract." Justices Durfee and Haile, in delivering the opinion of the court, say the contract and usage cannot stand together. Either the contract must prevail, and make void the usage, or the usage must prevail, and make void the contract. The contract described in this declaration is not a contract made with reference to the usage, but against it. The contract described is to labor for a year, but the usage terminates it at will. The contract is, by the very fact of its existence, a protest against the usage, for it ceases to be a special contract the moment that the usage is made part of it. A usage which annuls such a contract cannot be given in evidence without subverting the well-settled rule that usages inconsistent with a contract cannot be given in evidence to affect it. *Sweet v. Jenkins*, 1 R. I. 147. And to the same effect is the case of *Peters v. Staveley*, (court of Queen's bench,) where Chief Justice Cockburn holds that, the contract being for one week certain, the custom, even if proved, could not control it. 15 Law T. R. (N. S.) p. 275. Also, *Smith v. Sheridan*, (Sup.) 10 N. Y. Supp. 365. The same rule has been established by this

court in a number of cases. *Foley v. Mason*, *supra*; *Bank v. Graffin*, *supra*; *Fertilizer Co. v. White*, 66 Md. 452, 7 Atl. 802; *Patterson v. Crowther*, 70 Md. 125, 16 Atl. 531; *Bank v. Taliaferro*, 72 Md. 165, 19 Atl. 364. It follows, then, from this view of the case, that there was no error by the court in granting the plaintiff's fourth and fifth prayers, which were to the effect that there was no evidence of any usage by which the plaintiff could be discharged before the end of the contract period without sufficient cause, and the exclusion from the jury of all evidence offered to show the existence of such a usage. The first prayer of the defendant, relative to the existence of the usage, was properly rejected. The third, sixth, and eighth prayers of the defendant were properly rejected for the reasons we have heretofore given. The first prayer granted on the part of the plaintiff was correct, and contained the law upon that branch of the case. We have examined all the exceptions, and discover no error of which the appellant has a right to complain.

The first, second, fifth, sixth, and seventh exceptions to the admission of evidence are substantially the same, and present the question as to the degree of skill required of the plaintiff in the performance of his duty. The evidence was properly rejected because it tended to exact or to establish a higher degree of skill than that contemplated by the contract. The appellant was not a member of the National League at the time the contract was entered into, on November 14, 1891. It did not become such until January, 1892. This testimony was therefore immaterial and irrelevant.

The fourth exception was to the refusal of the court to allow the following question to be answered: "Can you tell whether or not there was any public complaint by the patrons of the manner in which Mr. Pickett filled his position?" It is unnecessary to pass upon the exception, as the witness afterwards substantially answered the question proposed, and defendant had the benefit of his answer.

The remaining exception was to the instruction of the court as to the measure of damages. This prayer instructed the jury that, if they found for the plaintiff, he was entitled to recover the contract price, less such sums as may have been paid to him, and also less such sums as he earned, or by the exercise of due diligence might have earned, in the line of his business, during the remainder of the period covered by the contract. We think this was unexceptionable, and is the law laid down by this court in *Railroad Co. v. Slack*, 45 Md. 161. Finding no error, and the whole case having been fairly submitted to the jury, the judgment will be affirmed.

ALLEN et al. v. MARONNE.

(23 S. W. 113, 93 Tenn. 161.)

Supreme Court of Tennessee. July 28, 1893.

Appeal from circuit court, Shelby county; L. H. Estes, Judge.

Action by William Maronne against Thomas H. Allen & Co. on a contract of employment for a balance due plaintiff on his salary. From a judgment for plaintiff, defendants appeal. Affirmed.

W. H. Percy, for appellants. M. B. Trezvant, for appellee.

McALISTER, J. This is a suit by an employe against his employer to recover balance due on salary. There was a verdict and judgment in the court below in favor of the plaintiff for \$1,162. The defendants appealed, and have assigned errors. It appears from the record that on the 10th November, 1890, William Maronne was employed by the firm of Thos. H. Allen & Co. as cotton salesman, for one year, at a stipulated salary of \$1,800. Maronne entered upon the discharge of his duties, and gave entire satisfaction to his employers; but on the 25th November, 1890, the firm of Thos. H. Allen & Co., failing in business, made an assignment, and Maronne was discharged. At the date of his discharge the firm was indebted to Maronne on account of salary in the sum of \$100, which they paid in full. In a few days thereafter, Harry Allen, one of the late firm, began a cotton factorage business on his own account, and immediately employed Maronne to perform the same services, and at the same salary he was to have received from Thos. H. Allen & Co. No definite time of employment was fixed. In his new employment Maronne earned \$180, and was discharged January 1, 1891, for an alleged cause. Maronne then made an effort to find employment in Memphis, but, meeting with no success, January 5, 1891, he went to New Orleans, where he secured a position with Strauss & Co., as cotton salesman. Maronne remained in the employment of Strauss & Co. until August 1, 1891, (the termination of the cotton season,) and earned during his connection with that firm the sum of \$430. It appears from the record that Maronne was diligent in seeking further employment, but without success. The circuit judge properly charged the jury that plaintiff would be entitled to recover balance due on his salary for one year, less any amount earned, or that ought by reasonable diligence to have been earned, in any other employment. The verdict of the jury was for the balance due on the salary at the contract price of \$1,800, after crediting it—First, by the sum of \$100 paid by Thos. H. Allen & Co.; second, by the sum of \$180 paid by Harry Allen; and, third, by the sum of \$430 earned by Maronne while in the employment of Strauss & Co.,—with interest on balance found to be due.

It is insisted on behalf of Thos. H. Allen & Co. that Maronne abandoned his first con-

tract; that is to say, he acquiesced in his dismissal by accepting a new and distinct employment with Harry Allen for the same time and at the same salary as under the first contract. We think this position is untenable. It is well settled that the proof of such release, renunciation, or acquiescence, when not in writing, but arising from acts or language, must be clear and unequivocal. We find no such proof in the record, and it is not true, as a matter of law, that a man who has been illegally discharged, by accepting a second employment, thereby acquiesces in his discharge, or waives his right of action for the breach of the first contract. If Maronne had not accepted the new contract of employment, he would have been precluded in this action from a recovery for a breach of the original contract to the extent of what he might have earned in his new employment. It was his imperative duty to accept the second employment. Jones v. Jones, 2 Swan, 608. The plaintiff's right of action accrued when the original contract was broken, without fault on his part. His subsequent conduct does not affect his right of action, but only affects the amount of recovery according as Maronne may have secured other employment, or may have been idle or diligent in seeking employment. Sedg. Dam. § 667.

It is also insisted on behalf of plaintiffs in error that Maronne was discharged by Harry Allen from the second employment for a sufficient cause, and that Thos. H. Allen & Co. are entitled to be credited with what Maronne might have earned to the end of the year. It is not shown, however, that the second employment was for any definite time, and, in point of fact, Harry Allen ceased to do business on his own account March 1, 1891. It thereby appears that if Maronne had not left Harry Allen on the 1st January, 1891, his employment would only have continued in any event until March 1, 1891. There was much proof taken and controversy below upon the question whether Maronne had been dismissed by Harry Allen for sufficient cause, it being insisted by defendants that, Maronne having been discharged on account of his misconduct, he should be charged with the full amount of what he might have earned if he had remained in the employment of Harry Allen. We think this issue immaterial, since the fact is undisputed in the record that Maronne, immediately upon severing his connection with Harry Allen, secured employment with Strauss & Co., of New Orleans, where he earned more money than he could have earned under his contract with Harry Allen, and Thos. H. Allen & Co. are given full credit for these earnings. It is immaterial in this view of the case whether Maronne was rightfully discharged by Allen or not. We have carefully examined all the assignments of error, and do not find any of them well taken. The charge of the circuit judge was quite as favorable to the defendants as they were entitled to, under all the facts and circumstances of the case. The judgment is affirmed.

SIMON v. ALLEN et al.

(13 S. W. 296, 76 Tex. 398.)

Supreme Court of Texas. March 7, 1890.

Appeal from district court, Polk county.

J. A. McCarell and T. T. Crosson, for appellant. James E. Hill, for appellees.

HENRY, J. Appellant was employed by appellees by the month, as a clerk in their store, at a salary of \$55 per month. He was discharged from said employment on the 4th day of February, and he commenced this suit in a justice's court to recover his salary for the whole of that month. It appears that defendants tendered "in the justice's court" to plaintiff the sum of \$7.35, which they claim was all that was due him, that being for the four days that he served in February. The evidence as to whether the defendant had proper cause to discharge plaintiff was conflicting. The defendant's testimony showed that he had sufficient cause therefor, which the plaintiff denied. On cross-examination, plaintiff testified that, after he was discharged, he sought employment, as a clerk, at a number of places in the state named by him, without procuring it. He testified that he did not try to get "work at a saw-mill, nor on a farm, nor at rail-splitting, nor at piling brush;" that he was a good-sized man, and in good health, but had never done such work; that he did not try to get business as a porter at a

depot until after he failed to get employment as a clerk at the places named by him; that on the 1st day of March he was given the position of porter at a railroad depot, where he still works. At the request of the defendants, the court gave the jury the following charge: "In case you find from the evidence that the defendants discharged the plaintiff (if they did) without reasonable cause, then you are instructed that it was the duty of plaintiff to seek employment at any work he could find to do, regardless of what he before that time had been doing. He must have sought and should have taken any honest employment he could get, and that even at a less price than he had been receiving before." We think it was error to give this charge. Plaintiff had the right to seek for a reasonable time, the same character of employment that he had when he was discharged. If, after a reasonable time, it became evident that he could not procure employment as a clerk, it would have become his duty, in so far as it concerned his relations with his late employers, to seek other employment, for which he was fitted. In view of his evidence on the subject, we think that the charge was calculated to mislead the jury. In view of another trial, it is proper to suggest, as to the time of the tender, that if it was not made before the institution of the suit in the justice's court it was error to adjudge the costs against plaintiff. The judgment is reversed, and the cause is remanded.

BURNETT v. RYLE et al.
(17 S. E. 896, 91 Ga. 701.)

Supreme Court of Georgia. May 22, 1893.

Error from superior court, Fulton county; M. J. Clarke, Judge.

Action by D. M. Ryle & Co. to enjoin Julius A. Burney from working for another. Judgment for plaintiffs, and defendant brings error. Reversed.

Hines, Shubrick & Felder, for plaintiff in error. Arnold & Arnold, for defendants in error.

LUMPKIN, J. The plaintiff in error, under a contract with one Crawford, the manager of the Massachusetts Benefit Association, an insurance company, had certain rights to transact business in the state of Georgia as the agent of that association. By a written contract he sold and assigned to the defendants in error all his right, title, and interest in and to the contract with Crawford above mentioned. The assignment also contained the following covenant: "I hereby bind myself to remain with the said firm of D. M. Ryle & Co., as special agent in the state of Georgia, for one year from this date, and to give my entire time and attention to the business of the Mass. Benefit Association by procuring applications for insurance for said company, and such other duties as may be agreed upon by us." Ryle & Co. filed an equitable petition, alleging that Burney had violated his contract with them, and was continuing to do so, by wholly abandoning his duties as solicitor for the Massachusetts company, and had begun business on his own account for the Connecticut Indemnity Association, which was an insurance company of a similar kind, and a rival in business. They prayed, among other things, that he be enjoined from further breaking the contract by continuing to represent the Connecticut company, and from soliciting or writing risks in the state of Georgia for any other than the Massachusetts company during the year covered by his contract with them. An injunction was granted forbidding the defendant "to solicit or receive or transact business for any insurance company other than the Mass. Benefit Association until July 15, 1893." This action of the court is the error complained of.

It does not appear from the allegations of the petition or from the evidence that Burney, as an insurance agent, was in any way remarkable, or that he had shown himself to be such a specially skillful, successful, or expert person in this business that it would be difficult or impracticable to supply his place by another agent equally competent to render such services as his contract required of him. For this reason the injunction, in our opinion, should have been denied. No doubt there are cases in which a court of equity will enjoin the breach of a contract, and compel one to abstain from performing personal services for

other persons which he was bound to render exclusively to the plaintiff. "But the services to be performed must be individual and peculiar because of their special merit or unique character, for otherwise the remedy at law would be adequate. But where the services involve the exercise of powers of mind, as of writers or performers, which are peculiarly and largely intellectual, they may form the class in which the court would interfere upon the ground that they are individual and peculiar. Damages for a breach of such contracts are not only difficult to ascertain, but cannot, with any certainty, be estimated; nor could the plaintiff procure, by means of any damages, the same services in the labor market as in case of an ordinary contract of employment between an artisan, a laborer, or a clerk and their employer." 2 Beach, Mod. Eq. Jur. § 772. The same doctrine is laid down in 3 Pom. Eq. Jur. § 1343, in which the following language is used: "Where a contract stipulates for special, unique, or extraordinary personal services or acts, or for such services or acts to be rendered or done by a party having special, unique, and extraordinary qualifications,—as, for example, by an eminent actor, singer, artist, and the like,—it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same or the same kind of services or acts elsewhere, or by employing any other person." There is nothing in the record before us to authorize the conclusion that Burney had extraordinary, or even unusual, qualifications for the business which he undertook to transact, and therefore, under the rule laid down by the eminent text writers from whom the above quotations are made, the present case is not a proper one for injunction.

There has been considerable discussion of the question as to whether or not an injunction would be granted in any case of this kind unless the stipulations not to render services to others were in form expressly negative. In the case at bar there was in the contract no express negative covenant by Burney not to render services to others than the plaintiffs. In *Chemical Co. v. Hardman* (1891) 2 Ch. Div. 416, a recent and thoroughly well-considered case, it was held that, in the absence of any negative stipulation in that behalf, the plaintiffs were not entitled to an injunction to restrain the manager of certain chemical works (who had agreed to give to their business, during a specified term, the whole of his time) from giving, during the term, a part of his time to a rival company. To those who may wish to further investigate this question, the opinion of Kekewich, J., from whose judgment an appeal was taken, and whose decision was reversed, and also the opinions of Lindley, L. J., and Kay, L. J., will be found decidedly interesting. And in the same connection it will be profitable to examine *Kerr, Inj.*, 445 et seq., *Singer Sewing-Mach. Co. v.*

Union Buttonhole & Embroidery Co., 1 Holmes, 253, Fed. Cas. No. 12,904, and McCaul v. Braham, 16 Fed. 37. The elaborate and well-prepared note of Mr. Abbott appended to the case last cited is a valuable contribution to the law pertaining to this subject. We deem it unnecessary, however, to enter into a further discussion of the question whether an ex-

press negative covenant in a contract of the kind under consideration is essential to the proper granting of an injunction, because, treating the contract in the case at bar as if it had contained such covenant, injunction should nevertheless have been refused for the reason stated in the beginning of this opinion. Judgment reversed.

LEHIGH & W. COAL CO. v. HAYES et ux.
(18 Atl. 387, 128 Pa. St. 294.)

Supreme Court of Pennsylvania. Oct. 7, 1889.

Error to court of common pleas, Luzerne county; **WOODWARD**, Judge.

Trespass on the case by James Hayes and Ann Hayes, his wife, against the Lehigh & Wilkesbarre Coal Company, a corporation, for the death of plaintiffs' son, a boy 14 years old, who worked in defendant's mine. It was alleged that defendant's negligence caused the accident, which occurred by drawing a car of coal from the chute where deceased was at work, thus causing a large quantity of coal to be precipitated on him, causing his death. Plaintiffs contended that defendant's servants at the mouth of the shaft should have notified deceased that they intended to draw the car, but it appeared that the latter had sent word by another employee that the car should be drawn out. There was a verdict for plaintiffs, damages assessed at \$1,500, judgment accordingly, and defendant brings error.

Andrew A. McClintock and *Henry W. Palmer*, for plaintiff in error. *William R. Gibbons* and *William S. McLean*, for defendants in error.

JGREEN, J. Upon the trial of this cause no evidence was given by the plaintiff to show that the defendant's breaker, and the machinery used in crushing and screening coal, was in any manner defectively built, or that it was not built in the same manner and with the same appliances as are used in all similar structures. The single act of negligence in this regard alleged against the defendant was that it had no appliance and used no means or method by which warning could be given to persons working in the pocket that a draw was about to be made. No evidence was given to show that it was customary among coal operators to give any such warning in the conduct of their collieries. It follows that there was no proof that the defendant neglected any of the precautions which were usually observed in carrying on the business of crushing, screening, and shipping coal. But the defendant did give testimony of importance upon this subject. G. M. Williamson, the mine inspector for the district in which this colliery was situated, testified that there were 62 collieries, or openings, altogether, in the district, and that this breaker, with its chutes and pockets, was constructed in the usual, ordinary way in which such breakers are constructed in that region. He also said he did not know that there was in use in any of the collieries of the district any signaling apparatus to indicate when coal is about to be drawn out of a chute to be lowered into a car. Joseph Tyrell, another witness, whose business was building breakers, and who built this one, testified that the breaker was built in the usual way in which breakers are built in that region, and that he knew of no breaker in the region in which,

prior to this accident, any apparatus or device was used to signal before coal was drawn from the chutes into cars. There was affirmative testimony, therefore, that this breaker was built in the usual way in which all breakers were built in that district; and that there was no custom or use, known to the witnesses, of having appliances of any kind to signal the drawing of coal from the chutes. Against this there was no opposing testimony whatever. The rule in regard to the obligation of the employer, respecting the character of the tools and appliances furnished by him, has been repeatedly stated in the recent decisions of this court. Thus, in *Railroad Co. v. Sentmeyer*, 92 Pa. St. 276, we said that, when the employer furnished his employes "with tools and appliances which, though not the best possible, may, by ordinary care, be used without danger, he has discharged his duty, and is not responsible for accidents." In *Payne v. Reese*, 100 Pa. St. 801, we said: "An employer is not bound to furnish for his workmen the 'safest' machinery, nor to provide the 'best methods' for its operation, in order to save himself from responsibility for accidents resulting from its use. If the machinery be of an ordinary character, and such as can, with reasonable care, be used without danger to the employe, it is all that can be required from the employer. This is the limit of his responsibility, and the sum total of his duty." In *Manufacturing Co. v. McCormick*, 118 Pa. St. 519, 12 Atl. Rep. 273, we said: "The general rule requires of the master that he provide materials and implements for the use of his servant such as are ordinarily used by persons in the same business; but he is not required to secure the best known materials, or to subject such as he does provide to a chemical analysis in order to settle, by experiment, what remote and possible hazard may be incurred by their use." In *Ship Building Works v. Nuttall*, 119 Pa. St. 149, 13 Atl. Rep. 65, we held that the employer was under no obligation to give warning to his employes of the dangerous character of a circular saw, or to provide it with a spreader to prevent accidents. As to the spreader we said: "The testimony shows that such an attachment is not in general use, and that there is no general agreement among mill-owners or practical sawyers that it is a desirable or a useful attachment. It is not enough that some persons regard it as a valuable safeguard. The test is general use. Tried by this test the saw of the defendant is such a one as the company had a right to use, because it is such as is commonly used by mill-owners; and it was error to leave to the jury any question of negligence based on the failure to provide a spreader." Applying these principles to the facts of the present case we fail to discover any evidence of negligence on the part of the defendant, so far as the character of the breaker and its appliances is concerned, and hence we can find nothing upon which to support a verdict for the plaintiff.

It was argued that the defendant should

have given a warning to the deceased that the coal was about to be drawn; but, in view of the fact that the plaintiff gave evidence tending to show that the boy sent out word that they should draw the coal, he being at that time in the chute, the necessity for any such warning does not appear. It was a matter of no consequence, so far as he was concerned.

whether his message was communicated to the parties outside or not. He, at least, was bound to avoid a danger which he must have had knowledge was likely to occur immediately. We think a verdict for the defendant should have been directed upon all the testimony. We sustain the first, second, third, seventh, and eighth assignments. Judgment reversed.

TAGG v. McGEORGE et al.
(26 Atl. 671, 155 Pa. St. 368.)

Supreme Court of Pennsylvania. May 22, 1893.

Appeal from court of common pleas, Delaware county.

Action by William F. Tagg, by his father and next friend, John S. Tagg, against William McGeorge, Jr., and others, executors and trustees under the will of Thomas Kent, deceased, for personal injuries. There was a judgment for plaintiff, and defendants appealed. Affirmed.

Isaac Johnson, for appellants. Ray W. Jones and V. Gilpin Robinson, for appellee.

DEAN, J. William F. Tagg, a boy past 13 years of age, was employed by defendants in their woolen mill at Darby, Delaware county. He went to work with the consent of and by contract with his father, who worked in the same mill. The boy commenced on 10th October, 1887, piecing at what is known as a "woolen mule." His wages were fixed at two dollars per week. The usual wages of a piecer are about six dollars. There was evidence tending to show that Henry T. Kent, one of defendants, made the contract for employment, and then put the boy in charge of Charles Chadwick, who had been foreman in the mill for many years. Under his directions and control he remained as a piecer at the mule up until the 31st of December, 1887. About 12 o'clock of that day, while cleaning the machine with waste, it being then running, the waste caught in the wheels, his hand was drawn in, and so completely crushed that amputation was necessary. The plaintiff then brought suit to recover damages, averring negligence on part of defendants, which resulted in the injury, (1) in putting a young and inexperienced boy to work at dangerous machinery without explaining to him its character, or warning him of its danger; (2) in directing him, by the foreman, Chadwick, to hurriedly clean the machine while it was running, without informing him of the peculiar danger incident to such work.

The law applicable to the issue is well settled. In the text-books, and, with rare exceptions, in all the adjudicated cases, the rule laid down in substance is: When young persons without experience are employed to work with dangerous machines it is the duty of the employer to give suitable instructions as to the manner of using them, and warning as to the hazard of carelessness in their use. If the employer neglect this duty, or if he give improper instructions, he is responsible for the injury resulting from his neglect of duty. He is not answerable for injury to adults, nor for the injuries to young persons who have had that experience from which knowledge of danger may reasonably be presumed, and that discretion which prompts to care. The cases cited by counsel for appellee

lants are not in conflict with this rule. In Zurn v. Tetlow, 134 Pa. St. 213, 19 Atl. 504, the boy was between 14 and 15, and had received such instructions from the foreman as were necessary to the nature of his employment. In O'Keefe v. Thorn (Pa. Sup.) 16 Atl. 737, the boy was over 14. He was employed to shove tin plates under a stamping machine, and was injured by thrusting his hand under the stamp. The machine was not dangerous. The consequence of putting the hand under the stamp was as obvious to a boy of 14 as to a man of 40. There has been no departure by this court from the law so clearly and concisely stated by our Brother Williams in Rummel v. Dilworth, Porter & Co., 131 Pa. St. 509, 19 Atl. 345, 346: "In the case of young persons it is the duty of the employer to take notice of their age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they should not be exposed. The duty in such cases to warn and instruct grows naturally out of the ignorance and inexperience of the employé, and it does not extend to those who are of mature years, and who are familiar with the employment and its risks." This was the law, as stated, in terms that could not be misunderstood, by the court below to the jury. There was evidence tending to show that the woolen mule was a dangerous piece of machinery even to the adult workman, and that it was highly dangerous to one attempting to clean it while running. As to whether the boy had received any instructions from the foreman, or had by experience or in any other way acquired a knowledge of the machine and the danger of attempting to clean it while running, there was conflicting evidence. It was of that character that the jury alone could determine the truth, and it was with proper instructions submitted to them. They were told explicitly, more than once, that if the boy, by instructions and warning from the foreman, or by information from others, or by experience while tending the machine, had knowledge of its dangerous character, there could be no recovery.

Complaint is made of the answer of the court to plaintiff's second point, because of the use of the word "perhaps." The point, in effect, requested the court to say that, if the jury found the boy to be young and inexperienced, it was the duty of defendants to explain to him the danger. The answer was: "I affirm that point, gentlemen, also with the qualification, perhaps, that if he had that experience from any other source, then it would not be necessary." It is argued that the direction should have been positive and peremptory that if he had the experience, no matter where obtained, instructions and warning on part of the foreman were immaterial, and there could be no recovery. Picking out this single word, and assuming that plaintiff's second point embraced all the instructions upon that subject to the jury, it is

liable to the charge of error. But, taking this answer in connection with what was said in other portions of the charge, there was no room for misunderstanding on part of the jury. In the body of the charge this pointed language is used: "You are first to find whether this boy had knowledge, either by previous experience either at Wolfenden's or any other place, or by knowledge obtained while he was operating this machine after running it two or three months, that it was dangerous. Now, if he knew it was dangerous to attempt to clean that machine while it was in operation, then he cannot recover." This same positive instruction, in substantially the same language, was given three times in the general charge, and the same idea or thought is expressed in five of the nine answers to plaintiff's points. In view of this oft-repeated correct statement of the law, we must assume that the jury could not have been misled by a single inadvertent use of a word which did not express correctly the meaning of the court.

So far as concerns the general rule applicable to employers and young and inexperienced employés, the law was plainly and correctly stated to the jury. The contradictory evidence was impartially submitted to them, that they might find whether it was a fact that the employment—cleaning a running machine of this character—was dangerous, whether the boy was ignorant and inexperienced, and whether the employer had failed in duty in not instructing or warning him. This disposes of appellants' first, second, third, sixth, and seventh assignments of error. No one of them is sustained.

The fourth and fifth assignments are to the answers of the court to plaintiff's fourth and fifth points. There was evidence on part of the plaintiff tending to show that another boy, named Tower, at another machine, just before the accident, had been taken away, and that the foreman, Chadwick, said to Tagg, "Hurry up, now, for, when you get

done cleaning yours, you have to do Tower's afterwards." It was argued that there was an exacting master urging a young boy to the hurried performance of dangerous work,—cleaning a machine while in motion,—and imposing on him a double duty. If the boy obeyed the command of the master, necessarily the danger was largely increased by a hurried and excited performance of the work. If the evidence satisfied the jury these facts had been proven, then the plaintiff asked the court to further instruct the jury that, if the injury happened in the effort of the boy to obey the unreasonable command of the master, their verdict should be for the plaintiff. The court, in answer to the request, said that, if the boy was not aware of the danger, and his will being subject to that of the foreman, he obeyed him because he thought the foreman knew better, or because he was afraid to disobey, then they should find for the plaintiff. This instruction was exactly in accord with the law as held by this court in Lee v. Woolsey, 109 Pa. St. 124, and Kehler v. Schwenk, 151 Pa. St. 519, 25 Atl. 130. In the case first cited an adult employé was called upon by the master to execute in haste a dangerous duty, and it was said he could not be supposed to remember at the moment a danger of which he may have had previous knowledge. It would be unreasonable to demand of him the same care which would be expected in cooler moments, or in a more deliberate performance of the task. In Kehler v. Schwenk,—the case of a boy over 14,—in an opinion by our Brother Green, we said: "He could not be expected to have the will power of a full-grown man in resisting his master's orders. He cannot be held, therefore, as one who voluntarily engages in a dangerous service, especially by a master who specifically directed him to do the hazardous work." Therefore, finding nothing of merit in any of the assignments of error, the judgment is affirmed, and appeal dismissed, at costs of appellant.

ANDERSON v. H. C. AKELEY LUMBER CO.¹

(49 N. W. 684, 47 Minn. 128.)

Supreme Court of Minnesota. Aug. 24, 1891.

Appeal from district court, Hennepin county; Smith, Judge.

Action by Nels Anderson against the H. C. Akeley Lumber Company for personal injuries. Judgment for plaintiff. Defendant appeals. Reversed.

Ripley, Brennan & Booth, for appellant. Steele & Rees, for respondent.

DICKINSON, J. While the plaintiff was engaged as a servant of the defendant in operating a planing-machine in its mill, a large leather belt, by which the machine was driven, parted at the place where the ends of the leather strip were united to form the belt, and struck the plaintiff's elbow, causing an injury for which this action is prosecuted. The defendant is charged with liability for negligence in respect to the fastening of the belt above referred to, the alleged fault being not in the method employed, but that the fastening had been allowed to become and to remain insecure. We have come to the conclusion that the case did not justify a recovery, for the reason that it is apparent that the plaintiff knew and assumed whatever risk there may have been from the defect complained of. A brief statement of the case will show the reason for this conclusion. One Godfrey was the defendant's foreman in this department of the mill, whose duty it was to personally repair defects of the nature of that complained of, when necessary. His duties and relations were such that it was ruled by the trial court, and, as we are inclined to think, correctly ruled, that he stood in the place of the principal, as to the matter here in question, so that negligence on his part would be deemed to be the negligence of the defendant. Without further statement or comment upon that point, we assume this to be the proper principle applicable to that feature of the case. This belt was about four inches wide. The fastening referred to consisted of five brass hooks. The belt was at the side of the machine, fully exposed to view. It ran over a large pulley at one end of the machine, and over a small pulley, four or five inches in diameter, at the other. The motion of the belt was very rapid,—about 30 miles an hour. The plaintiff was of the age of 24 years. He had been at work with such machines about a year and a half, and for a year before the accident he had been in charge of and personally operating one of them, handling the lumber as it was run into the machine, oiling it, setting it in motion, and stopping it, as occasion might require. On the day of the accident, according to the testimony of the plaintiff, as he was about to start his machine in the morning, he observed that one of the hooks or fastenings in the belt

was gone. On cross-examination he said that one or two of the hooks were out, and that "the belt was near gone," and that he so stated to the foreman, whose attention he called to the subject. He informed the foreman of this, because, as he says, he "thought there was something wrong." He testifies that when he reported the matter to the foreman, and told him he thought the belt would have to be fixed, the foreman examined it, and then said: "That belt is all right; you go ahead." The plaintiff set the machine in motion, and used it about half an hour, when he stopped it to get a new supply of lumber. He looked at the belt then, and it seemed to be as it had been before. He again started the machine, and after it had run a few minutes the belt broke apart, with the result before stated. There were five such machines in the same room, where the plaintiff had been long at work. The evidence shows that the breaking apart of such belts is a frequent occurrence, and cannot be avoided. The plaintiff, however, says that he never saw one of these belts break before, "because every time the machine was stopped a man had a chance to see it before it started." He did know of other belts breaking under the machine. In our judgment, the following conclusions must be accepted as being perfectly apparent from the evidence: In view of his age and his experience in operating such machines, he must be presumed to have had at least ordinary knowledge and judgment as to the conditions to which we have referred. He is to be deemed to have known that this belt was being driven with great velocity; that by it the power was applied for the operating of this machine; that the belt might be expected to break apart unless its fastenings were secure; and that, if it should break while in such rapid motion, it might reasonably be expected to strike any object in the immediate vicinity with considerable violence. Not only may it be said that he should be presumed to have known that, unless the fastenings were kept secure, the belt was liable to break apart, but it is apparent from his own testimony that he did know this, and that he knew that this fastening had become insecure. His testimony that the belt was "near gone," and that he so told the foreman, if true, can have no other meaning. No reason can be suggested for his reporting the fact to the foreman than that he thought that the belt was liable to break apart. It is therefore to be concluded that he assumed the risk, which was as apparent to him as it could be to any one. It does not appear that any necessity rested upon him to proceed with the use of the machine with the belt in that condition, or that he was unwilling to take the hazard of doing so. It may be inferred that the foreman would not repair it at that time; but it is not shown that the plaintiff might not have done so himself in a few moments' time, although it was not within the general scope of his duty to repair belts in the mill. The order refusing a new trial is reversed.

¹ Rehearing refused.

WHEELER v. BERRY et al.
(54 N. W. 876, 95 Mich. 250.)

Supreme Court of Michigan. April 7, 1893.

Error to circuit court, Wayne county; George Gartner, Judge.

Action for personal injuries by Henry C. Wheeler against Joseph H. Berry and Thomas Berry. Defendants had judgment by direction of the court, and plaintiff brings error. Affirmed.

The other facts fully appear in the following statement by GRANT, J.:

Defendants were manufacturers of heaters and gas machines. In their factory was a carpenter's shop, which contained two small circular saws, run by machinery, and other tools and machines. In this shop they made parts of the gas machines and crates used for shipping them. Plaintiff was about 50 years of age, and in the full possession of his faculties. He was employed by defendants as a general laborer at \$1.50 a day. At the time of the accident he had been in their employ a year and a half. The circular saws projected a few inches above an adjustable table, and were used for sawing boards for crating. The saw was supplied with a gauge to regulate the width of the pieces to be sawed. Plaintiff commenced to use the saw a year before the accident. He was instructed in its use by one of the carpenters, and was informed of the danger which, whatever it was, was apparent. It does not appear that there was any difficulty in using the saw, the operation consisting in pushing the board against it. He testified that he protested against being put to that work, the grounds of his protest being sometimes that he was not employed for that work, and at other times that he was afraid of the saw. He, however, did the work at various times during the year, and says that he every time protested to the foreman who instructed him to do it. He made no protest direct to the defendants. He was sawing at the time a piece of board 19 inches long into strips about 4 inches wide. He was pushing the board against the saw, and as it got almost through the further end raised on the saw, and in some way his hand went against the saw, and was injured. He was alone at the time, and this is all the explanation given as to the manner of the accident. He had had no trouble with the machine before, and it had been in use in the shop for many years. One witness, who was accustomed to use the saw, testified that sometimes it would catch a short piece of board and throw it back towards him, or, as he expressed it, "throw it in my face."

The declaration contained three counts. The first two are based upon the theory that the defendants negligently put the plaintiff at dangerous work, against his protest, and outside the scope of his employment. The

third count contained the additional allegation that "the buzz saw was not a suitable or proper saw upon which to cut or saw short boards, and it was dangerous to cut or saw short boards thereon, all of which said defendants well knew, and all of which the plaintiff did not know." At the conclusion of the plaintiff's case the court directed a verdict for the defendants.

McVeigh & Bolton and Moore & Moore, for appellant. Stewart O. Van de Mark, (Michael Brennan, of counsel,) for appellees.

GRANT, J., (after stating the facts.) Plaintiff's counsel now insist upon three grounds of negligence, which they claim should have been submitted to the jury, viz.: (1) Ordering the plaintiff to do the work in question, as it was outside the scope of his employment; (2) in using a gauge which was improperly constructed, and out of repair; (3) neglecting to explain to the plaintiff the dangers of the saw and the gauge.

To the first and third allegations it is a sufficient reply to say that the plaintiff was thoroughly instructed by the defendants' agent in the use of the saw; that whatever danger there was was apparent; that he had full and complete knowledge of all the risks; that he was strong in body and mind, and in full possession of all his faculties; and that he had frequently done this work for a year, and was familiar with it. Plaintiff knew that he was liable to be called upon to do it. Even if it were without the scope of his employment, he could not by his protest cast all the risk of accident upon his employer. An employee, under such circumstances, has his choice either to leave the employment or to remain and assume all the risks incident to the work he knows that he is expected to do. Railway Co. v. Bayfield, 37 Mich. 205, is in no respect applicable to the present case. Bayfield's decedent was young, weak, and inexperienced, but the court based its decision entirely upon his inexperience. He commenced to work in May, and was killed in June. If he had been a man of age, experience, strong in body and mind, had been familiar with the work of braking for a year, and had done it himself when directed during that time, we think it clear that no recovery in that case would have been sustained. In Broderick v. Depot Co., 58 Mich. 261, 22 N. W. Rep. 802, Broderick was sent for the first time to close a defective damper in a ventilating shaft in a dark place. He was ignorant of its construction, and, in attempting to close the ventilator, was following the instructions of his superior. The inapplicability of that case to the present one is apparent.

2. To the second claim now made by plaintiff's counsel in his brief it is sufficient to say that no such negligence is alleged

in the declaration, nor does it contain any language from which any such claim can possibly be inferred.

3. Plaintiff's evidence does not bring the cause of the accident within the allegations of his declaration. The theory of the declaration is that in some way his hand was drawn upon and against the saw. The record contains no proof that this would be the result even if the end of the board were raised as he testifies. *Prentiss v. Manufacturing Co.*, 63 Mich. 478, 30 N. W. Rep. 109, is quite similar to the present case, and we think controls it. The language there used

applies with equal force here, viz.: "One of the difficulties with the plaintiff's case is it does not appear from the record that the plaintiff's injury occurred from either of the causes assigned; neither does it appear that any such or like injury ever did occur from the causes claimed." See, also, *Kean v. Rolling-Mills*, 66 Mich. 277, 33 N. W. Rep. 895; *Melzer v. Car Co.*, 76 Mich. 94, 42 N. W. Rep. 1078. Judgment affirmed.

HOOKER, C. J., and LONG, J., concurred. McGRATH and MONTGOMERY, JJ., concurred in the result.

HASTY v. SEARS.

(31 N. E. 759, 157 Mass. 123.)

Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 8, 1892.Report from superior court, Suffolk county.
Action by Andrew Hasty against Frederick R. Sears, for personal injuries. Judgment on verdict for defendant.

Henry Hyde Smith, for plaintiff. J. Lowell, Jr., and S. H. Smith, for defendant.

BARKER, J. The plaintiff cannot recover if he was a fellow servant with the boy who negligently lowered the elevator car upon him while he was at work in the elevator well, upon a stepladder standing on the bottom of the well. The plaintiff was a carpenter, employed by the hour by the firm of C. A. Noyes & Co. They told him that there was some work to be done at the defendant's building, and that the superintendent of the building would tell him what was to be done. He went to the building, and the superintendent instructed him what work was to be done, namely, that the framework of the elevator door wanted fixing, and that the door needed loosening at the top. To do this work it was necessary to stand on a ladder or steps in the elevator well, and to take the door off. The elevator was in operation, and the superintendent, in the presence and hearing of the plaintiff, gave orders to the elevator boy not to run the car below the second story until he was notified that the plaintiff had finished his work and had left the well. The boy, when the orders were given, said that he understood them, and that he would not run the car below the second story. The plaintiff then began his work, standing on the stepladder; and, while he was ascending it in order to take out the door which needed repairs, the boy ran the car down below the second story, so that it struck and injured the plaintiff.

It is obvious that C. A. Noyes & Co. were not contractors. The transaction between them and the defendant was the loan by them to the defendant of their servant, the plaintiff, who was to be under the control of the defendant, by his superintendent, while engaged in the work. This made the plaintiff *pro hac vice* a servant of the defendant. The principle is thus stated by Cockburn, C. J., in *Rourke v. Colliery Co.*, 2 C. P. Div. 205, 209: "But when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must

be dealt with as a servant of the man to whom he is lent, although he remains the general servant of the person who lent him." The plaintiff was not acting under the immediate orders of his general masters, C. A. Noyes & Co., but was acting under the orders of the defendant's superintendent, and thus became the defendant's servant, notwithstanding that he remained the general servant of Noyes & Co., and was paid by them. *Purnell v. Railway Co.*, 1 Q. B. Div. 636, as stated by Mellish, L. J., in *Rourke v. Colliery Co.*, 2 C. P. Div. 210. The same doctrine has been laid down by this court in cases in which one has been held liable for injuries caused by the negligence of a person in the general employment of a third person, but at the time engaged in the defendant's business,—*Forsyth v. Hooper*, 11 Allen, 419; *Kimball v. Cushman*, 103 Mass. 194, 198; *Clapp v. Kemp*, 122 Mass. 481; *Linnehan v. Rollins*, 137 Mass. 123; and also in cases in which, as in the present, the question is whether the person injured and the person whose negligence caused the injury were fellow servants,—*Johnson v. Boston*, 118 Mass. 114, 117; *Killea v. Faxon*, 125 Mass. 485; *Ward v. Fibre Co.*, 154 Mass. 419, 28 N. E. 299, and cases cited. The plaintiff and the elevator boy having both been servants of the defendant at the time of the plaintiff's injury, their employment was a common employment, and the negligence of the boy in running the car down upon the plaintiff was an obvious risk of the plaintiff's employment, which he assumed, and for which the defendant is not answerable to him. The plaintiff and the boy were both working to secure the successful operation of the elevator,—the plaintiff in repairing it, and the boy in operating the car,—and they were forwarding a common enterprise for the benefit of the defendant, and were in a common employment. *Johnson v. Towboat Co.*, 135 Mass. 209; *McGee v. Cordage Co.*, 139 Mass. 445, 448, 1 N. E. 745; *Clifford v. Railroad Co.*, 141 Mass. 564, 6 N. E. 751. The case thus comes clearly within the principle that when a man enters into an employment in the carrying on of which others are engaged with him he tacitly agrees to accept all the ordinary risks attending it. The plaintiff must have known that there was risk that the elevator boy would be careless and forget his orders not to lower the car below the second story, and that while he was himself at work in the well below he would be liable to injury from such negligence. *Rourke v. Colliery Co.*, 1 C. P. Div. 556, 559. Judgment on the verdict.

NIXON v. SELBY SMELTING & LEAD CO.

(No. 15,204.)

(86 Pac. 803, 102 Cal. 458.)

Supreme Court of California. May 16, 1894.

Commissioners' decision. Department 1. Appeal from superior court, Contra Costa county; John P. Jones, Judge.

Action by Robert Nixon against the Selby Smelting & Lead Company, a corporation, for personal injuries caused by defendant's negligence while plaintiff was in its employ. From a judgment for plaintiff, and from an order denying its motion for a new trial, defendant appeals. Affirmed.

Page & Eells, for appellant. John P. O'Brien, for respondent.

VANCLIEF, C. Action to recover damages for a personal injury alleged to have been suffered by plaintiff while in the employ of defendant, in consequence of the neglect and failure of defendant to provide proper and safe instruments and appliances with which plaintiff was employed to work. The trial was by jury, and the verdict and judgment was in favor of the plaintiff for the sum of \$3,816. The plaintiff was employed to work, and at the time he was injured was working, in a room called the "silver room," in which silver is separated from lead and gold by dissolving it in hot diluted sulphuric acid, and then precipitating it from the solution. In this process the solution passed through three adjoining tanks, in the last of which the silver is precipitated, and from which, after the precipitation, the hot diluted acid is pumped through a rubber hose into what is called the "waste tank." While the plaintiff was using this hose in the usual manner, it parted at a point between the tanks, and the hot acid was thereby discharged upon the plaintiff's shoulder and back, and scalded him severely. There were four sets of tanks in the silver room, the waste acid from all of which was pumped into the same waste tank; but only three of the sets were ordinarily used at the same time. On the day of the accident, however, all were used, and the waste acid from all four was to be pumped into the waste tank at the same time; but there were only three hose in the silver room through which to pump it. Under these circumstances, Mr. Helm, the foreman of the silver room, extemporized a fourth hose by connecting two pieces of old hose that had been lying in the silver room for a long time, after having been used for conducting steam into the tanks, for which purpose only short hose was necessary. The two pieces of old hose were connected by slipping one end of each over a piece of lead pipe about eight inches long, so that the two ends met near the middle of the piece of pipe, but were not tied or otherwise fastened to the pipe except by

their elastic force, which depended partly upon their quality and partly upon the comparative size of the pipe and the orifice in the hose. About 10 or 15 minutes after plaintiff had commenced to use this hose, one of the connected pieces slipped from the lead pipe, with the result above stated. It appears that these pieces of old hose were much worn and eaten by the acid in which they had been formerly used, and it is admitted by appellant that, without having been tightly bound to the lead pipe by a wrapping of wire or twine, they were unfit for the use to which Mr. Helm put them. The evidence is quite sufficient to justify a finding by the jury that the plaintiff had no notice that this hose, as constructed and adjusted to the tanks by Mr. Helm, was defective, or that he exposed himself to any danger by using it. He was not present while Mr. Helm was connecting the two pieces, though Mr. Helm had told him that the hose to be used by him would be made by connecting the two pieces of old hose, and he knew when he commenced using it that it had been so made. He had not been regularly employed in the silver room, but only occasionally, during the year preceding the accident. He had never before used, nor seen used, a spliced hose, but had implicit confidence that the hose prepared and furnished by Mr. Helm was sufficient for the use intended, and could be safely used. Mr. Roff was general superintendent of the smelting works, and employed and discharged all the men. Under him Mr. Bee was superintendent of the silver room; but Mr. Helm was foreman of all the men employed upon the tanks in the process of dissolving and precipitating silver, and was given power, not only to direct the men employed in those processes, but to determine what implements and appliances should be used, especially for pumping the acids. As to this, Mr. Bee, on the part of the defendant, testified as follows: "All requisitions for materials and supplies in the silver room come to me. Mr. Helm makes all requisitions to me, including rubber hose. Mr. Helm is the foreman in charge of those tanks,—in the immediate supervision of them. All requisitions for rubber hose that he has made to me have been filled immediately. * * * Mr. Helm is the man who has that matter in charge. * * * When the tanks are to be drawn off, I don't generally superintend. That he does. That matter is always intrusted to him. The matter of drawing off the tanks is a matter he controls by his judgment."

1. It is not questioned that the injury to plaintiff was caused by the negligence of Helm, but appellant contends that Helm was a fellow servant of plaintiff, and therefore that the negligence of Helm was the negligence of a fellow servant merely, and not that of the defendant corporation. It must be admitted that, according to the firmly-

settled rule of law in this state, Helm, notwithstanding the higher grade of service in which he was employed, was a fellow servant with plaintiff in so far as he served in the places or with the machinery or appliances prepared and furnished by the defendant; and, for the consequences to fellow servants of his negligence in the performance of such services in the places or with machinery or appliances thus prepared and furnished, the defendant is not responsible; but in so far as Helm was authorized and employed to prepare the places in which other servants were to work, or to furnish the machinery or appliances with which they were to work, he represented the corporate defendant, and his negligence in the performance of these services was the negligence of the defendant, for the injurious consequences of which to other servants, without their fault, it is responsible to the same extent it would have been if such places, machinery, and appliances had been prepared and furnished through the immediate agency of Mr. Roff, the general superintendent, or by Mr. Bee, the special superintendent, of the silver room. The reason of this is that it is the duty of employers to provide and furnish suitable and safe appliances (such as rubber hose in this case) with which their employes are required to work; and the law does not permit employers to transfer or shift their responsibility for the performance of this duty to any agent or servant. Of course, they may employ agents or servants to perform this duty, but, in case they do so, all negligence in the performance thereof is nevertheless deemed their negligence, for which they are responsible to a servant or employe thereby injured without contributory negligence on his part. In cases of this kind the agents of the employer who construct or furnish machinery or appliances to be used by employes are not, *quoad hoc*, fellow servants, although at the same time they may be fellow servants in the performance of other services. Perhaps the observation of this dual relation may reconcile some of the apparent inconsistencies of the cases in this state; but, however this may be, the principles and distinctions, as above stated, are expressly recognized in the later cases, and are consistent with all the cases in this state, except perhaps the cases of *McKune v. Railroad Co.*, 66 Cal. 302, 5 Pac. 482, and *Brown v. Sennett*, 68 Cal. 225, 9 Pac. 74, which have been criticised and doubted, if not overruled. In *Daves v. Southern Pac. Co.*, 98 Cal. 20, 32 Pac. 708, one Bresnahan was the foreman of a gang of men, including James Daves, employed in repairing a section of defendant's railroad; and, while thus engaged, Daves was killed, in consequence of the negligence of Bresnahan; and the question was whether such negligence was to be deemed the negligence of the defendant, or only that of a fellow servant. Speaking for the court in bank, Mr. Justice Fitzgerald said: "This

must be determined, not from the grade or rank of the section foreman, but from the character of the act performed by him. If the act was one which it was the duty of the employer to perform towards its servants, and one of them negligently performed it, to the injury of another servant in the same common employment, then the offending servant, in the performance of such duty, acted as the representative or agent of his employer, for which the employer is responsible. If it was not, then they were fellow servants, and the fellow servant is alone responsible. The duties which a railroad corporation owes to its servants, and which it is required to perform, are to furnish suitable machinery and appliances by which the service is to be performed, and to keep them in repair and order; to exercise ordinary care in the selection and retention of sufficient and competent servants to properly conduct the business in which the servant is employed; and to make such provision for the safety of employes as will reasonably protect them against the dangers incident to their employment. The performance of these duties cannot be shifted by it to a servant so as to avoid responsibility for the injury caused to another servant by its omission; nor is their negligent performance one of the ordinary risks of the service, impliedly assumed by the employe by his contract of employment." A similar question arose in department 2 of this court in the case of *Burns v. Sennett*, 99 Cal. 863, 33 Pac. 916, in which the alleged negligence was that of failing properly to construct and adjust a strap used as a part of the machinery in connection with which plaintiff was working at the time he was injured; and the question was whether the defendants were liable for such negligence. "And this," said Mr. Justice McFarland, "can be correctly answered only by determining whether or not the proper placing and maintaining of the strap was a positive duty which the appellants personally owed to respondent. *Daves v. Southern Pac. Co.*, 98 Cal. 19, 32 Pac. 708; *Railroad Co. v. Baugh*, 149 U. S. 369, 13 Sup. Ct. 914. * * * And if, in the case at bar, the adjustment and maintenance of the said strap was not a duty which appellants owed personally to respondent, then all the gang of men employed by appellants in loading the ship were fellow servants, and respondent could not recover of appellants for injuries caused by the negligence of one or more of said fellow servants in constructing, parcelling, etc., the strap. There is another general rule, however, under which alone, upon the facts so far appearing, respondent can maintain this action, if he can maintain it at all, and that general rule is that an employer must furnish machinery and appliances reasonably suitable and safe for the employe to do his work. In such a case the employer is, of course, not bound to insure the employe against any defect in such

appliances, but he is bound to use reasonable care in their selection or construction; and, where that rule applies, the duty to furnish such machinery and appliances is one which the employer owes personally to the employed, and he cannot escape that duty by trusting it to an employe who negligently performs it." The learned justice further says that this general rule "does not apply to a case where several persons are employed to do certain work, and by the contract of employment, either express or implied, the employes are to adjust the appliances by which the work is to be done." In *Elledge v. Railway Co.* (Cal.) 34 Pac. 720, the defendant was held liable, under this rule, for the negligence of its foreman on a mine in putting plaintiff in an unsafe place in which to do his work. See, also, *Sanborn v. Trading Co.*, 70 Cal. 281, 11 Pac. 710, and *Bowen v. Railway Co.*, 95 Mo. 269, 8 S. W. 230.

2. As to appellant's contention that plaintiff was guilty of contributory negligence, little need be added to what has already been said. The only ground upon which it is claimed that plaintiff was negligent is that the insufficiency of the hose used by him "was patent to an ordinary observer." But

no witness so testified; and plaintiff testified to the contrary, as above stated, and, if the jury believed his testimony, they were justified in finding that he was not guilty of contributory negligence. The most that appellant can justly claim is that the evidence on this issue was conflicting.

3. It is contended that the verdict is contrary to the instructions of the court, and therefore is against the law. This point is founded upon a construction of certain isolated instructions, given at request of defendant, which I do not think they will bear when read in connection with all other instructions given. It is not claimed here that any part of the instructions is erroneous, or inconsistent with any other part; and, after a careful examination and comparison of the eight printed pages of the instructions given, I am unable to perceive that, as a whole, they are inconsistent with the verdict. I think the order and judgment should be affirmed.

We concur: BELCHER, Q.; TEMPLE, Q.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment appealed from are affirmed.

**McELLIGOTT v. RANDOLPH.
RANDOLPH v. McELLIGOTT.**

(22 Atl. 1094, 61 Conn. 157.)

Supreme Court of Errors of Connecticut. Oct. 26, 1891.

Cross appeals from superior court, New Haven county; Fenn, Judge.

Action by McElligott, administratrix, against Randolph, to recover damages for the death of plaintiff's decedent. From a judgment for plaintiff by default, both parties appeal. Affirmed.

J. O'Neil, for plaintiff. S. W. Kellogg, for defendants.

PRENTICE, J. The plaintiff's intestate was in the employ of the defendants, and while so employed was accidentally killed. He left a widow, three minor children, and one child in utero sa mere. The complaint alleges that the intestate's death was caused by the defendants' negligence, and claims damages laid at \$5,000. The defendants having suffered a default, the damages were assessed by the court, and \$1,000 awarded. Both parties appeal.

The plaintiff assigns five reasons of appeal. These reasons, however, are in substance one, namely, that the court failed to assess any damages based upon the pecuniary value of the life of the deceased to his wife and children. The plaintiff's claim is that the history of legislation in this state, beginning with the act of 1848, providing for the survival of certain actions of tort, and embracing the act of 1853, fixing a maximum and minimum of recovery where death should result from railway accidents, and providing for its distribution, shows that our statutes contemplate and authorize two independent cumulative recoveries,—one for the pain and suffering of the deceased up to the moment of his death; and another for the subsequent loss to the surviving widow, children, and heirs. Former adjudications of this court render a discussion of this claim unnecessary. The precise question here raised was in all its aspects considered and decided in the case of *Goodsell v. Railroad Co.*, 33 Conn. 51. The opinion of the court in that case, in clear and forcible language, discusses the claims urged upon us, explains the objects and relations of the acts of 1845 and 1853, and in plainest terms lays down the rule for the assessment of damages in cases of personal injuries resulting in death. The rule thus laid down the court below applied in the case at bar. The defendants' reasons of appeal are, in substance, that the facts found disclose that they were not guilty of negligence, and that the plaintiff's intestate was guilty of contributory negligence. The deceased was one of 200 factory operatives employed by the defendants. In the wheel pit of the defendants' factory was a large wheel, weighing upwards of 12 tons, which it was desired to remove for the substitution of another of an improved pattern. The work was one

of some difficulty, and required the exercise of mechanical skill. It was by the defendants intrusted to one Deming, who was the master mechanic of the factory, and a capable machinist. For the performance of the work he selected from the defendants' hands 10 men, the best adapted for the work. These men were not skilled or trained in mechanical work; with competent instructions, oversight, and direction, however, they were competent to perform the work. Otherwise they were incompetent. Among these 10 was McElligott, who was chosen because he had requested that extra employment be given him whenever practicable, and because he had once assisted in a similar operation. In order that the removal of the wheel might interfere as little as possible with the operation of the factory, the work was performed during the night. The wheel was made up of ten sections. These sections were removed independently. About midnight, some of the sections having been removed, Deming was induced by the entreaties of his little boy, who was present, to go home. The work grew more difficult as the removal progressed. By the removal of the fifth section, Deming having then left, the wheel was put out of gear with the gear wheel on the engine shaft, and it became necessary to support it. Deming had foreseen this contingency, and had given instructions for the use of a certain wooden horse for the suspension of a block and falls, for the purpose of supporting and holding in place the remaining sections of the wheel when it should become out of gear. After Deming's departure one Johnson was regarded as the foreman of the work. He, like his fellows, was without mechanical training or skill. When support of the wheel became necessary, the horse was placed in position, and the block and falls attached thereto. One of the workmen went and got a rope from the defendants' stock, attached it to the shaft of the wheel, and fastened the block and falls to it. By means of this apparatus the wheel was supported. It was also blocked up underneath in some way by one of the workmen. There were sufficient and suitable ropes, supports, props, and other appliances, together with others which were insufficient and unsuitable, upon the premises near the point of work. Deming gave no instructions as to which of these, save the wooden horse above referred to, should be used, or how they should be selected. Those used were picked out by one and another workman, as wanted. The rope used to support the wheel was got by one Phalen, and it was by him adjusted into position. Neither the rope nor the method of its adjustment was examined by any one else. Phalen likewise put the blocking into position. This was also done without supervision or examination. This being done, the work progressed safely until during the removal of the eighth section, when the rope and horse gave way, and the wheel fell into the pit. The deceased was at the time sitting upon the hub of the wheel, en-

gaged in his work, and was by the accident cast down to his death. The cause of the accident was, in the language of the finding, "the inadequacy of the support, the rope being insufficient in size and strength for the strain upon it, and the support by which the wheel was blocked being also inadequate, improperly placed to sustain the weight to which it was adapted, and the whole arrangement and device was in the highest degree unsuitable and insecure, in view of the weight to be supported and the extreme hazard involved."

Upon these facts the defendants claim that they had performed their whole duty in the premises, in that they had provided competent and suitable persons to oversee, direct, and do the work, and also suitable and sufficient appliances, tools, and materials therefor. The rule of duty of master and servant is well settled in this state. It is the master's duty to exercise reasonable care to provide for his servant a reasonably safe place in which to work, reasonably safe appliances and instrumentalities for his work, and fit and competent persons as his co-laborers. It is equally well settled that performance of these duties cannot be effected by the simple giving of an order, their execution being intrusted to another. The designation of an agent, however fit and competent that agent may be, for the execution of the master's duties, does not fill out the sum of the master's obligation, nor seem to relieve the master from further responsibility. Until the agent thus selected and empowered in fact acts up to the limit of the duty of his master to act, the master's duty is not done. The master's duty requires performance. He may, at his option, perform in person or delegate performance to another. In either case, reasonable care must be exercised in the doing of the acts required to be done by the master. *Wilson v. Linen Co.*, 50 Conn. 433; *Lanning v. Railroad Co.*, 49 N. Y. 521; *Hough v. Railway Co.*, 100 U. S. 213; *Davis v. Railroad Co.*, 55 Vt. 84; *Ford v. Railroad Co.*, 110 Mass. 240; *Harper v. Railroad Co.*, 47 Mo. 573; *Brodeur v. Valley Falls Co.*, 16 R. I. 448, 17 Atl. 54; *Railroad Co. v. Jackson*, 55 Ill. 492. Wood, in his work on *Master and Servant*, (page 871,) states the rule as follows: "The rule established and supported by the better class of cases is that whenever the master delegates to another the performance of a duty to his servants which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middle-man whom he has selected as his agent, and to the extent of the discharge of those duties by the middle-man he stands in the place of the master."

Examining the facts of the case with reference to these legal principles, we observe that while it is true that the defendants intrusted the execution of the work upon which McElligott was engaged to a competent superintendent, provided him (McElligott) with co-laborers who were fit and competent, when

under competent supervision, and had upon the premises appliances and apparatus suitable for the work, it is equally true that during the progress of much of the work, and at the time of and for a considerable time prior to the accident, the work was wholly without competent superintendence; that there was even no one present who was possessed of mechanical skill; that the provision of suitable appliances was simply in the sense of there being such near at hand, mingled with others unsuitable; that those appliances, which were in fact chosen and set apart for the work, were mainly selected by unskilled factory hands, at random, and without instructions, oversight, or examination; and that they were adjusted by like laborers, with the like absence of instructions, oversight, and examination. The accident happened in part because a certain wooden horse or support was inadequate. Deming, the superintendent, selected this particular appliance and directed its use. The wheel fell in part because a certain rope was too small and inadequate. The defendants had done nothing to provide a suitable rope, except to have upon the premises a stock of various kinds of rope, some suited to one purpose and some to another, and to allow any chance, unexperienced laborer to select for such special use the one which his impulse dictated. Just here we touch upon the most significant and potent factor in the situation, namely, the entire absence of competent superintendence during all the later stages of the work. After Deming's departure, about midnight, there was no one, either over or connected with the gang of men employed, who possessed any mechanical knowledge or skill. Had Deming remained present, properly executing his masters' duty intrusted to him, there would have been no such unintelligent, haphazard selection of apparatus, no such inadequate and unsuitable devices of support, as were instrumental in McElligott's death. Moreover, Deming's departure in an instant transformed McElligott and his fellows from fit into unfit co-laborers. The finding states explicitly that these men were incompetent for the work assigned them, without suitable supervision. During the hours, therefore, which succeeded Deming's return home, McElligott was surrounded only by incompetent fellow-workmen, and he went down to his death in consequence of constructions and mechanical adjustments made by his fellow-servants, employed by the defendants to do, in company with him, what they were unfit to do. Plainly, therefore, the defendants' duties, as masters of the deceased, were not performed.

The defendants' counsel in their brief urge that, as their clients had intrusted the execution of the work to a competent agent, they were relieved from further responsibility. This position, as we have already indicated, is not well taken. They also appeal to the familiar rule that the master is not liable for injuries to one servant through the negligence of his fellow-servant, and argue with much

vigor, and with an imposing array of authorities, that Deming was a fellow-servant of the deceased, and not a vice-principal of the defendants. The error in this line of reasoning lies in an attempt to classify Deming's position by the grade or general scope of the duties of his employment. The error is one to which it must be confessed that many decisions have given countenance. But the better modern authorities have united in pointing out the error, and the difficulties incident to it, and in establishing the true rule. This rule makes the character of the act or omission wherein the negligence exists the test of the master's responsibility therefor. One may, in some of his acts, be executing his master's duty towards the master's servants, while in others of his acts he is simply a fellow-servant of the same or of a higher or lower grade. The master's responsibility, or non-responsibility, in case of injury, is determined, not by the rank or grade of the offending servant, but by the character of the particular act or omission to which the injury is attributable. 7 Amer. & Eng. Enc. Law, pp. 824, 834; Wood, Mast. & Serv. 871, 438; Davis v. Railroad Co., 55 Vt. 84; and the other cases last cited.

There only remains to consider the defendants' claim that the facts disclose that McElligott's own negligence contributed to his death. The finding shows that, as McElligott was leaving the factory upon the evening in question, he was met by the factory superintendent, who, after learning that McElligott was going to work upon the removal of the wheel, said to him: "I guess I had better see about this, because your work is such that we want you to-morrow. Do not work later than 10 o'clock. I have no objection to your working until then, but after that you ought to go home and get rested for to-morrow, be-

cause we can't spare you." Deming before his departure also said to McElligott: "But you had better go home about twelve o'clock. They will need your work to-morrow." It also appears that a plank extended across the wheel-pit in such manner that McElligott might have safely stood upon it in the performance of the act he was engaged in at the moment of the accident. These are the facts relied upon as showing contributory negligence. McElligott's failure to go home clearly cannot bar recovery, whatever the directions to him were. He in fact remained, as the finding expressly states, in the service of the defendants up to the moment of his death. His remaining did not absolve his employers from their duty to him. The relation of master and servant continued, with all that that relation implies. On the other hand, McElligott's remaining can in no true sense be regarded as a contributory cause of his death. It is true that, if he had gone home at midnight, he would not have been killed. It is equally true that if he had not gone to the work at all he would have escaped the catastrophe. His going to the work was as much the occasion of his death as his remaining at it. Neither were contributory causes, in the legal sense. They were simply conditions which made his injuries possible. Smithwick v. Hall, 59 Conn. 263, 21 Atl. 924. McElligott, at the time of the accident, was sitting upon the hub of the wheel engaged in his work. This position was a convenient one for him. It was apparently, to his observation at least, a safe one also. That, as between two apparently safe positions, he failed to choose the one which proved to be safe in fact, certainly cannot be ascribed to him as negligence. There was no error in the judgment complained of. The other judges concurred.

DUCKETT v. POOL.

(11 S. E. 689, 83 S. C. 238.)

Supreme Court of South Carolina. July 2, 1890.

Appeal from common pleas circuit court of Laurens county; JAMES F. IZLAR, Judge. Action for enticing from his master a servant. The contract of hire was verbal, and not to be performed within a year. Gen. St. S. C. § 2019, provides: "No action shall be brought * * * upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement, * * * or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith."

Ferguson & Featherstone, for appellant.
W. H. Martin, for respondent.

McIVER, J. The allegations in the complaint are that plaintiff entered into a contract with one Henry Murrell whereby the latter agreed to live on plaintiff's farm, and work for him, for the year 1889, and that defendant, after notice of this contract, enticed said Murrell from plaintiff's service, to the damage of the plaintiff \$500. The only defense interposed was a general denial of all the allegations contained in the complaint. The plaintiff offered testimony tending to show that some time in November, 1888, he made a verbal contract with said Murrell to stay with him for the year 1889 upon the same terms as had been agreed upon between them for the year 1888, but when he was proceeding to state those terms, and had gone as far as to say that he (plaintiff) was to furnish the mule, seed, and plantation tools, and give Murrell one-half that was made, he was stopped by the court with the statement that it was not necessary to give all the terms of the contract; that, in consequence of something that he heard as to the conduct of the defendant in reference to the hands on plaintiff's farm, he sent word to defendant that those hands were under contract with him, "and, as a gentleman, I asked him not to have anything to do with them." This message appears to have been communicated through the medium of a written note, to which defendant replied, also by written note, saying that he would have nothing to do with the hands if they were under contract. There was also testimony tending to show that, when defendant received the note from plaintiff, he inquired of the bearer of the note, as well as another person, whether the contract was in writing. There was also testimony tending to show that soon after this correspondence between the parties, to-wit, about the 12th of January, 1889, defendant sent his wagon, and moved said Henry Murrell from plaintiff's place to his own. At the close of plaintiff's testimony, defendant moved for a nonsuit upon three grounds: First, because the contract between plaintiff and Murrell, not being in writing, was void under the statute of frauds, inasmuch as it was not to be performed within one year "from the making thereof;" second, "that there is no proof that he enticed him away;" third, "that the relation of master and

servant has not been established." The motion for nonsuit was granted by the circuit judge solely "because there was no evidence that the defendant had enticed, induced, or otherwise caused the man Murrell to leave the employment of the plaintiff." Plaintiff appeals upon three grounds set out in the record, which in fact simply make the single question whether there was error in granting the nonsuit on the ground stated. The respondent, however, according to the proper practice, gave notice that, if the supreme court should be unable to sustain the judgment of nonsuit upon the ground on which it was rested by the circuit judge, he would insist that such judgment should be sustained upon the ground that, the alleged contract between the plaintiff and Murrell being invalid under the statute of frauds, the action could not be sustained. So that the only questions presented by this appeal are (1) whether there was error on the part of the circuit judge in holding that "there was no evidence that the defendant had enticed, induced, or otherwise caused the man Murrell to leave the employment of the plaintiff;" (2) as to the effect of the statute of frauds. It is true that respondent's counsel, in his argument here, has also undertaken to sustain the judgment of nonsuit upon the third ground upon which he based his motion in the court below, to-wit, that there was no evidence that the relation of master and servant existed between the plaintiff and Murrell; but this ground is not properly before us, as the necessary notice was not given, and hence the respondent is not entitled to have it considered. We may say, however, that, even if it could be considered, it would not avail the respondent; for there certainly was some evidence tending to show such a relation, and whether sufficient or not would be immaterial in a question like this.

Turning, then, to the two questions really presented by this appeal, it seems to us clear that there was error in holding that there was no evidence tending to show that defendant had enticed or induced Murrell to leave plaintiff's employment. It will be observed that the question here is not whether the evidence was sufficient to establish that fact; for that is a question exclusively for the jury, and they should have been allowed to pass upon it. There certainly was evidence tending to show that Murrell had been in the employment of plaintiff for the year 1888, and that he had by verbal contract agreed to remain on the same terms for the year 1889; that defendant had explicit notice of that agreement; and that soon afterwards he sent his wagon, and moved Murrell to his own place. And the further fact that defendant inquired particularly whether there was any written contract between plaintiff and his hands is not without significance. These and other circumstances in the case afforded room for the inference that Murrell had been induced by the defendant to leave plaintiff's employment, and it should have been left to the jury to say whether such an inference should be drawn from the facts. Indeed, it is laid down in *Wood, Mast. &*

Serv. 450, upon the authority of *Milburne v. Byrne*, 1 Cranch, C. C. 239,¹ that the employment of one's servant by another is *prima facie* evidence of enticement, provided defendant has notice that the services of the servant were due to the plaintiff.

It only remains to consider the effect of the statute of frauds, for we think it clear that the agreement between the plaintiff and Murrell falls within that statute, as it was made in November, 1888, and was not to be performed "within the space of one year from the making thereof," but, on the contrary, extended through the whole of the year 1889. So that, while it is clear that either of the parties to that agreement might have availed themselves of the benefit of that statute,—or, to speak more accurately, no action could have been brought by either of the parties upon such agreement,—yet the question here is whether the defendant, a third person, can avail himself of the benefit of the statute. On this subject we find the following doctrines laid down in 3 Pars. Cont. 56 et seq.: "It is to be noticed that, while some of the sections of the statute of frauds declare the oral contracts which they are intended to prevent utterly void, the fourth section [under which the contract now in question falls] only provides that no action shall be brought upon the promises or for the purposes therein enumerated. * * * The distinction is sometimes important; nor is it adequately expressed in the cases which say that these oral contracts embraced within the fourth section are not void, but voidable, by the statute of frauds. We consider them neither void nor voidable. If they were good at common law, they remain good now for all purposes but that expressly negatived by the statute; that is, no action can be brought upon them. But in other respects they are valid contracts. * * * The contract is valid as to third parties although the statute has not been complied with. * * * The defense of the statute of frauds can be made only by the parties to the contract or their privies." This doctrine seems to have been recognized and applied in the case of *Keane v. Boycott*, 2 H. Bl. 511. Where there is a subsisting relation of service, even though it be not legally binding upon the servant, and determinable at the will of the servant, it seems that the action may be maintained by the master against one who officiously—to use the language of *EYRE*, C. J., in *Keane v. Boycott*—interferes, and induces the servant to leave the master's

employment. See *Haskins v. Royster*, 70 N. C. 604. If, however, the servant, not being legally bound, terminates the relation of his own head, no action can be maintained against one who subsequently employs such servant. *Sykes v. Dixon*, 9 Adol. & E. 693. The principles quoted above from Parsons on Contracts find an analogy in the well-settled rule as to the effect of a discharge in bankruptcy, or the statute of limitations upon the contract affected thereby. In such cases the validity of the contract is not affected, but simply the right of action to enforce it. *Wilson v. Kelly*, 16 S. C. 216.

There is another view which would be sufficient to show that the mere fact that the contract between the plaintiff and Murrell, not being in writing, would not afford the basis of an action by either of those parties, is not sufficient to defeat the present action. In the case of *Rice v. Manley*, 66 N. Y. 82, it was held that where the defendant, by false and fraudulent representations, had induced one Stebbins to violate a verbal contract, which, under the statute of frauds in New York, was void, an action could be maintained. The referee found as matter of fact that Stebbins, though not legally bound to do so, would have performed his contract with plaintiff but for the interference of the defendant. Now in this case, upon the principle involved in the case just cited, it would seem that the question of fact should have been left to the jury,—whether Murrell, but for the interference of defendant, would have been willing to perform the contract which he had entered into with the plaintiff, though not in such a form as would have subjected him to an action for its breach.

There was evidence that the contract for the year 1889 had been made, and that, in accordance with one of its terms, Murrell remained on plaintiff's place for some days after that year had commenced, and until he was taken off through the agency of the defendant; and it was for the jury, and not the circuit judge, to say whether these facts, together with any other circumstances in the case, would have justified the inference that Murrell intended to fulfill his verbal agreement with plaintiff, and would have done so but for the interference of the defendant.

It seems to us, therefore, that in any view of the case there was error in granting the nonsuit. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded for a new trial.

SIMPSON, C. J., and McGOWAN, J., concur.

¹ Fed. Cas. No. 9,542.

**NORTH CHICAGO CITY RY. CO. v.
GASTKA.**

(21 N. E. 522, 128 Ill. 613.)

Supreme Court of Illinois. May 16, 1889.

Appeal from appellate court, First district.

Action by John Gastka against the North Chicago City Railway Company, to recover damages for personal injuries. Plaintiff had a verdict for \$3,000. Defendant appeals.

William C. Goudy, for appellant. *John Gibbons* and *Frank H. Goin*, for appellee.

PER CURIAM. This was an action of trespass on the case, to recover for personal injuries. The declaration contained three counts. The second count in the amended declaration sets up plaintiff's cause of action more fully than either of the other counts, and it is in substance as follows: That, on the 18th day of August, 1885, defendant was operating a city passenger railway in the city of Chicago, and was possessed of certain cars drawn by horses for the conveyance of passengers upon said railway; that divers newsboys, for a long time prior to the happening of the grievances complained of, were accustomed to go upon said cars to sell newspapers to the passengers upon said cars, with the knowledge, consent, and approbation of, and without the objection of, defendant, and plaintiff, as such newsboy, on the day last aforesaid, boarded a certain passenger car, possessed by defendant, for the purpose of selling newspapers to the passengers who had taken passage on said car, as he lawfully might; that, while plaintiff was lawfully upon said car, and in the exercise of due care, defendant, through its servants and agents, without notice to plaintiff to get off said car, and without any warning to plaintiff, then and there, violently, negligently, and unlawfully cast and threw plaintiff with great force and violence to the ground there; and certain horses of defendant, and a certain passenger railway car of defendant, drawn by said horses, and moving in an opposite direction to that in which said first mentioned car was running, tramped upon and ran over the body and legs of plaintiff; and, by reason of being then and there tramped upon and run over, divers bones of plaintiff's body were broken, and the legs of plaintiff were crushed, contused, mangled, lacerated, and broken; and he became and was sick, sore, lame, and disordered; and so remained from thence hitherto, during all which time plaintiff thereby suffered great pain, and was prevented from transacting his ordinary business. To the declaration the defendant pleaded the general issue, and on a trial before a jury the plaintiff recovered a judgment which was affirmed in the appellate court. It is insisted in behalf of the North Chicago City Railway Company that it is not liable, for the reason that "the act of throwing the plaintiff from the car was the violent, wanton, and malicious personal act of Bullock,

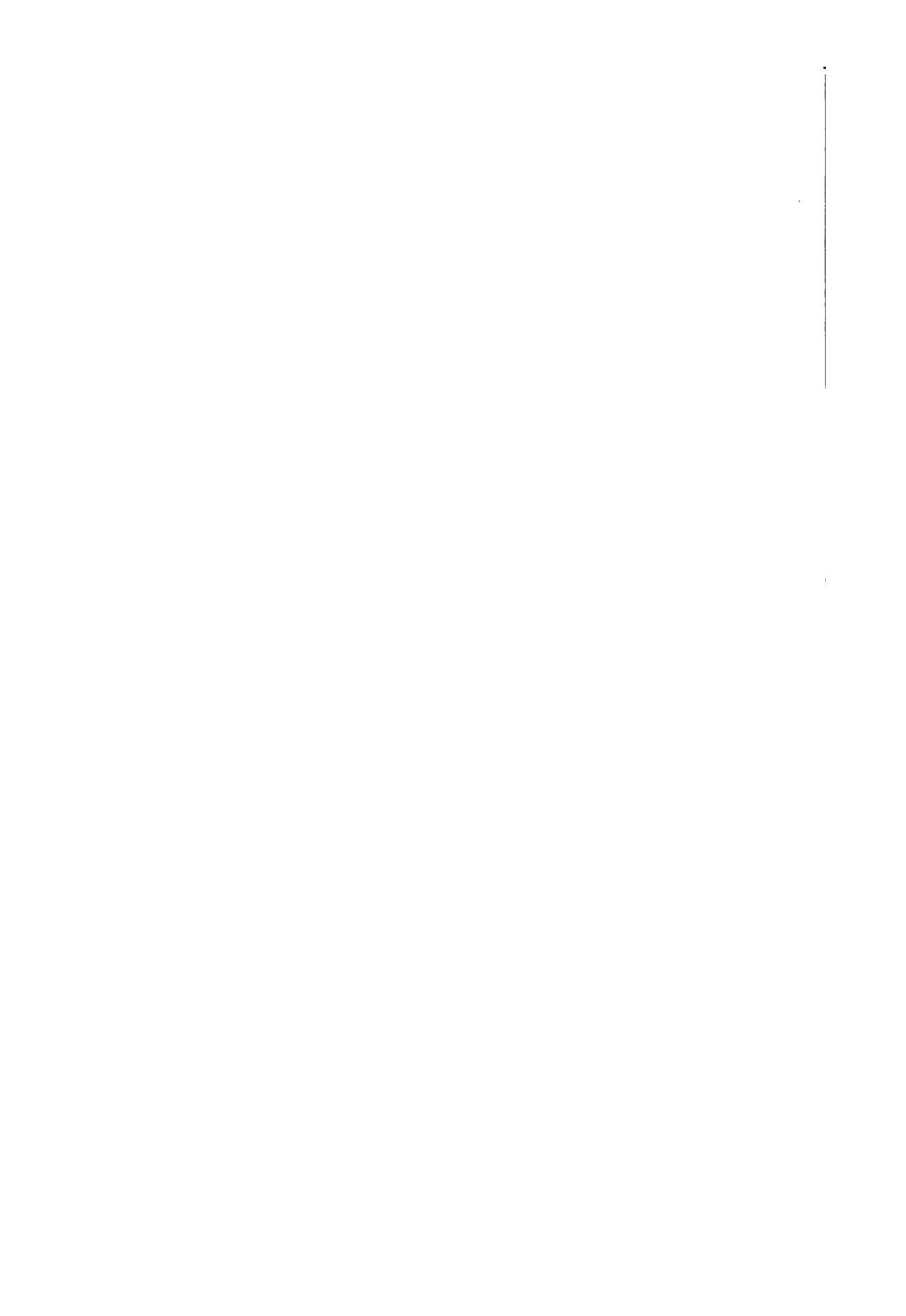
the conductor, and he alone is liable." Much of the argument has been devoted to establish this proposition, and quite a number of authorities have been cited to maintain the view of the defendant. We do not think there is any difficulty in reference to the law upon this question. Where the relation of master and servant exists between the railway company and the person whose act may be the cause of an injury to another, the company will not be liable if the servant in causing the injury is not acting within the scope of his employment; but, on the other hand, the law is equally well settled that the master will be responsible, where the servant acts within the general scope of his employment, for acts done while engaged in his master's business, with a view to the furtherance of that business, by which injury is caused to another, whether negligently or wantonly committed. *Railway Co. v. West*, 125 Ill. 321, 17 N. E. Rep. 788. It was claimed, on the trial of the cause in the circuit court, by the defendant that the conductor did not push the plaintiff off the car, but that plaintiff of his own accord jumped off the car and was thus injured, and so the conductor testified; but here the defendant seems to have changed his line of defense, claiming that the injury was the result of the wanton and malicious personal act of the conductor. In the view we take of the case, it will not be necessary to stop to inquire which theory of the defendant may be correct on the question of fact, or, indeed, whether either was sustained by the evidence. Under the rule laid down in the case cited, if the plaintiff was injured by the act of the conductor when acting under the general scope of his employment, the defendant will be liable. The conductor had charge of the car. One of his duties was to collect fares from persons who might enter the car. Now, while engaged in the discharge of this duty, in passing through the car, he came to the plaintiff, who a short time before had entered the car, and, as the evidence introduced on the part of plaintiff tended to prove, he pushed the plaintiff off the car. The testimony of the conductor, of itself, is enough to establish the fact that he was acting within the general scope of his employment when the plaintiff was put off the car. He testified: "I got to Chicago avenue, and there was an old gentleman got on. We got near Superior street. We started up again. We got between the blocks. This boy jumped on the car. I started to go around to collect fares, and, in so doing, I swung off the back platform and shouted to the boy 'Look out, there!' and he jumped off, and the car coming north caught him. The boy was about five feet from me, I guess, when he jumped from the car. I was just swinging off from the rear platform." If the plaintiff was a trespasser on the car, or if he was unlawfully riding on the car without the payment of fare, was a matter of no moment.

If plaintiff had no right on the car, and the conductor in the discharge of his duty as manager of the car undertook to put him off, the law required him to act in a prudent manner, and exercise due care for the safety of the plaintiff, and if he failed to do so, and in consequence the plaintiff was injured, the defendant was liable. The court gave, in behalf of the plaintiff, four instructions; and in the argument it is claimed that they are all erroneous. The instructions may contain technical inaccuracies, but in the main we regard them as correct. They contain nothing calculated to mislead the jury. All the instructions asked on behalf of the defendant—10 in number—were given as asked. There is, therefore, no just ground for claiming that the jury were not fully instructed.

One other question remains to be consid-

ered. Two witnesses who had been subpoenaed to attend and testify for defendant, and who had been in attendance, failed to appear when defendant had finished introducing his other evidence, and the defendant requested time to procure the witnesses. The court delayed the cause some 15 minutes, and then refused to wait longer for the witnesses. On the motion for a new trial, an affidavit on behalf of defendant was read, showing the facts relied upon on this branch of the case. It may be that the evidence of the witnesses would have been material, but it nowhere appears from the showing of defendant that the absence of the witnesses was not by its consent, and upon this ground alone the defendant failed to make a proper showing. The judgment of appellate court will be affirmed.







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